CLERK'S COPY
149
595909
Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 84

DIXIE PINE PRODUCTS COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 5, 1943.

CERTIORARI GRANTED OCTOBER 11, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 84

DIXIE PINE PRODUCTS COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Fifth Circuit	a	1
Caption ..... (omitted in printing)	a	
Proceedings before United States Board of Tax Appeals	1	1
Docket entries	1	1
Petition	2	2
Amended petition	6	4
Exhibit "A"—Letter, Commissioner to Dixie Pine Products Co., dated April 15, 1940, with statement attached	10	7
Answer of respondent to amended petition	15	11
Exhibits—Record in case Dixie Pine Products Company vs. Howard Dyer, Commissioner, Mississippi State Court	17	12
Exhibit marked Petitioner's No. 1—Bill of Complaint	17	12
Exhibit marked Petitioner's No. 2—Final decree, entered August 15, 1936	30	22
Exhibit marked Petitioner's No. 3—Answer of defendant to bill of complaint	31	23
Exhibit marked Petitioner's No. 4—Agreed statement of facts	40	30
Exhibit marked Petitioner's No. 5—Final decree, entered December 21, 1938	45	34

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 25, 1943.

—8607

	Original	Print
Proceedings before United States Board of Tax Appeals—Continued		
Findings of fact and opinion, Murdock, M.	47	35
Decision	52	39
Petition for review	52	40
Assignment of errors	56	43
Praecipe for transcript	58	44
Clerk's certificate (omitted in printing)	60	
Minute entry of argument and submission	61	46
Opinion, McCord, J.	62	46
Judgment	66	49
Clerk's certificate (omitted in printing)	67	
Order allowing certiorari	68	50

[fol. "A"] [Caption omitted]

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103015

DIXIE PINE PRODUCTS COMPANY, Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

APPEARANCES:

For Taxpayer:

R. J. Wooton, Esq., T. J. Wills, Esq., Harry B. Kelleher, Esq.

For Comm'r:

Donald P. Moyers, Esq.

1940

May 28—Petition received and filed. Taxpayer notified. (Fee paid.)

May 28—Copy of petition served on General Counsel.

June 15—Amended petition filed. 6/17/40 copy served on General Counsel.

Aug. 2—Answer to amended petition filed by General Counsel.

Aug. 2—Request for hearing in New Orleans, La., filed by General Counsel.

Aug. 7—Notice issued placing proceeding in New Orleans, La., Calendar. Answer and request served.

Dec. 11—Hearing set Jan. 27, 1941, New Orleans, La.

[fol. 2]

1941

Jan. 29—Hearing had before Mr. Murdock on merits. Submitted. Appearance of Harry B. Kelleher and T. J. Wills filed. Briefs due as per rules.

Feb. 7—Transcript of hearing 1/29/41 filed.

Mar. 15—Brief filed by taxpayer. 3/17/41 copy served on General Counsel.

Mar. 15—Brief filed by General Counsel.
Mar. 15—Brief filed by taxpayer. 3/17/41 copy served on General Counsel.
Oct. 7—Findings of fact and opinion rendered, Murdock, Div. 3. Decision will be entered for the respondent. 10/7/41 copy served.
Oct. 11—Decision entered, Murdock, Div. 3.

1942

Jan. 9—Supersedeas bond in the amount of $10,000 approved and ordered filed.
Jan. 9—Petition for review by United States Circuit Court of Appeals, Fifth Circuit, with assignments of error filed by taxpayer.
Jan. 9—Praecipe filed by taxpayer.
Jan. 9—Affidavit of service by mail of petition for review and praecipe, filed by taxpayer.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Received May 28, 1940

Filed May 28, 1940

Comes the Dixie Pine Products Company, a corporation, located and whose present address is Hattiesburg, Mis-[fol. 3] sissippi, by its attorney, and respectfully shows unto the Court that it is incorporated under the laws of the State of Mississippi, with its principal office and its domicile in the city of Hattiesburg and State of Mississippi, and respectfully appeals from the decision of the Commissioner of Internal Revenue, Agent in Charge of the New Orleans Division, located at New Orleans, Louisiana, rendered on the 15th day of April, 1940, imposing a deficiency in tax for the year ended December 31, 1937, for the sum of $4770.04.

The said record touching the facts upon which the deficiency tax assessment is made and upon which objections have been filed and heard is on file with the Internal Revenue Agent in charge at New Orleans, Louisiana, and the same is prayed to be made a part of this petition upon the filing of the same by the Internal Revenue Agent in

Charge, as if copied herein and in accordance with the provisions of the law and the rules and regulations of this board.

This tax payer would respectfully show unto the Board that it operates upon an accrual basis, that is to say that all of its fixed charges to profit and loss are accrued monthly, 1/12 of the total amount imposed as a charge upon the tax payer, to be paid from its profit and loss account. That during the year 1937 the State of Mississippi imposed a tax upon the solvent used by this tax payer in the operation of its business of extracting rosin from pine wood in its plant located at Hattiesburg, Mississippi. That this tax payer contested the tax so imposed but since the tax assessment was made by the proper official of the State of Mississippi, with the power under the statutes of said State, to collect the same by distress without other or further legal proceedings, this tax payer accrued the tax so assessed against it by the State of Mississippi.

[fol. 4] That this tax payer litigated with the State of Mississippi, the legality of the assessment of the tax so made and in December of 1938 was successful in having the Supreme Court of the State of Mississippi hold that the said tax was not a proper charge against this tax payer.

This tax payer would show that the said solvent tax, herein referred to, was a tax imposed by the State of Mississippi and a tax, if paid by this tax payer, which was a deductable item from the amount of profits upon which it would make return and pay the income tax to the United States Government. That having accrued the tax for the year 1937, in making its returns for the payment of the income tax to the United States Government, it deducted the amount of the tax so assessed and so accrued by it as being payable to the State of Mississippi, in accordance with the assessment made by the proper state authorities of the State of Mississippi.

This tax payer would show that in 1938, when the Supreme Court had finally passed upon the liability of this tax payer for the tax so assessed against it by the State of Mississippi, this tax payer took into account as a recovery the amount of tax so assessed against it by the State of Mississippi for the year 1937, and for which it had taken deduction in its return to the United States Government for income tax purposes.

This tax payer would show that the amount of the solvent gasoline tax levied by the State of Mississippi was $20,839.38, which said amount was accrued by this tax payer to be paid to the State of Mississippi in the event it lost its case before the Supreme Court. When the Supreme Court decided in this tax payer's favor in 1938, this tax payer took the said sum of $20,839.38 back into its profit and loss account and made return thereon and included the said amount in its return for the year 1938. [fol. 5] This tax payer would show that the Internal Revenue Agent in Charge has disallowed the said sum of $20,839.38 accrued for the year 1937, both in 1937 and 1938 and has assessed this additional tax of $4770.04 against this tax payer.

From the action of the Internal Revenue Agent in Charge at New Orleans, Louisiana, this tax payer files this petition for an appeal and a review before this Board of the action and prays this Board to consider this appeal, and upon a final hearing to reverse the decision of the Internal Revenue Agent in charge and the Technical Staff of the Southwestern Division and hold that this tax payer was correct in its accrual charges and is not liable for the said additional tax so charged against it.

As provided by law a certified check of $10.00 as a filing fee is enclosed herewith, as is required by the Revenue Act of 1934 and 1936.

R. G. Wooton, Attorney for tax payer, Carter Bldg., Hattiesburg, Miss. T. J. Wills, Hattiesburg, Miss., of Counsel.

Duly sworn to by T. F. Dreyfus. Jurat omitted in printing.

[fol. 6] BEFORE UNITED STATES BOARD OF TAX APPEALS

AMENDED PETITION—Received June 15, 1940

Filed June 15, 1940

[Title omitted]

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency

dated April 15th, 1940, and as a basis of his proceeding alleges as follows:

1. The petitioner is a corporation with principal office at Dixie Pine, Hattiesburg, Mississippi. The return for the period here involved was filed with the collecto for the State district of Mississippi.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on April 15th, 1940.

[fol. 7] 3. The taxes in controversy are income taxes for the calendar year 1937 and in the amount of Four thousand seven hundred seventy dollars and four cents ($4770.04).

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

A claim of a credit on the return for Twenty thousand eight hundred thirty-nine dollars and thirty-eight cents ($20,839.38) imposed by the Law of the State of Mississippi on gasoline and assessed against this petitioner by the Motor Vehicle Commissioner of the State of Mississippi, authorized to assess and collect tax on gasoline and petroleum products and which this petitioner had accrued during the year 1937, for the tax so levied and demanded for the year 1937 has been disallowed by the Internal Revenue Agent in charge of the New Orleans division, located at New Orleans, Louisiana, and the disallowance approved by the Board of Conferees of the Internal Revenue Agents for the Southwestern division.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

The petitioner operates its business upon an accrual basis so that its fixed charges to profit and loss are accrued monthly, 1/12 of the total amount so charged to petitioner to be paid from its profit and loss account is charged each month during the calendar year. That during the year 1937 the State of Mississippi imposed a tax upon the solvent used by this petitioner in the operation of its business of extracting rosin from pine wood in its plant located at Hattiesburg, Mississippi. That this petitioner contested the tax so imposed but since the tax assessment was made by the proper official of the State of Mississippi, with the power under the statutes of said

State, to collect the same by distress without other or [fol. 8] further legal proceedings, this petitioner accrued the tax so assessed against it by the State of Mississippi.

That this petitioner litigated with the State of Mississippi, the legality of the assessment of the tax so made and in December of 1938 was successful in having the Supreme Court of the State of Mississippi hold that the said tax was not a proper charge against this petitioner.

This petitioner would show that the said solvent tax, herein referred to, was a tax imposed by the State of Mississippi and a tax, if paid by this petitioner, would be a deductable item from the amount of profits upon which it would make return and pay the income tax to the United States Government. That having accrued the tax for the year 1937, in making its returns for the payment of the income tax to the United States Government, it deducted the amount of the tax so assessed and so accrued by it as being payable to the State of Mississippi, in accordance with the assessment made by the proper state authorities of the State of Mississippi.

This petitioner would show that in 1938, when the Supreme Court had finally passed upon the liability of this petitioner for the tax so assessed against it by the State of Mississippi, this petitioner took into account as a recovery the amount of tax so assessed against it by the State of Mississippi for the year 1937, and for which it had taken deduction in its return to the United States Government for income tax purposes.

This petitioner would show that the amount of the solvent gasoline tax levied by the State of Mississippi was $20,839.38, which said amount was accrued by this petitioner to be paid, to the State of Mississippi in the event it lost its case before the Supreme Court. When the Supreme Court decided in this petitioner's favor in 1938, this petitioner [fol. 9] took the said sum of $20,839.38 back into its profit and loss account and made return thereon and included the said amount in its return for the year 1938.

This petitioner would show that the Internal Revenue Agent in Charge has disallowed the said sum of $20,839.38 accrued for the year 1937, both in 1937 and in 1938 and has assessed this additional tax of $4770.04 against this petitioner.

Wherefore, the petitioner prays that this Board may hear the proceeding and may reverse the decision of the Internal Revenue Agent in Charge and disallow the assessment so made against this petitioner.

R. J. Wooton, Counsel for Petitioner.

Hattiesburg, Mississippi.
T. J. Wills, of Counsel.

Duly sworn to by T. F. Dreyfus.
Jurat omitted in printing.

[fol. 10] EXHIBIT "A" TO AMENDED PETITION

Treasury Department,
Internal Revenue Service,
New Orleans, Louisiana.

Office of Internal Revenue Agent in Charge, New Orleans Division.

April 15, 1940.

Dixie Pine Products Company, Hattiesburg, Mississippi.

SIRS:

You are advised that the determination of your income tax liability for the taxable year ending December 31, 1937 discloses a deficiency of $3,600.09 and that the determination of your excess-profits tax liability for the year mentioned discloses a deficiency of $1,169.95 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, New Orleans, Louisiana for the attention of —. The signing and filing of this form will expedite the closing of your return by permitting

an early assessment of the deficiencies, and will prevent the [fol. 11] accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner by William E. Logan, Internal Revenue Agent in Charge.

Enclosures: Statement. Form of waiver.

STATEMENT

Dixie Pine Products Company, Hattiesburg, Mississippi

Tax Liability for Taxable Year Ended December 31, 1937

	Liability	Assessed	Deficiency
Income Tax	$9,340.89	$5,740.80	$3,600.09
Excess-Profits Tax	$1,175.87	$ 5.92	$1,169.95

In making this determination of your income and excess-profits tax liability, careful consideration has been given to the report of examination dated June 8, 1938; to your protests dated September 8, 1938 and March 13, 1939; to the statements made at the conference held on March 14, 1939, April 17, 1939 and March 13, 1940; and to your communications dated April 19, 1939, April 29, 1939 and March 21, 1940.

[fol. 12] Adjustments to Net Income

Net income as disclosed by return		$ 46,011.23
Unallowable deduction and additional income:		
(a) Solvent taxes disallowed	$20,839.38	
(b) Interest	.74	20,840.12
Total		$ 66,851.35
Additional deductions:		
(c) Depreciation		1,264.09
Net income adjusted		$ 65,587.26

Explanation of Adjustments

(a) Before the accrual of an expense item can be allowed as a deduction for the year in which accrued, it must be shown to the satisfaction of the Commissioner that such

an accrual represents an actual liability. In view of the fact that while you accrued as of December 31, 1937 the gasoline tax of six cents a gallon claimed by the State of Mississippi as due on the 347,323 gallons of solvent used by you in your manufacturing operations, you denied the liability and were as of the same date seeking by legal processes to have the tax declared to be not applicable to you, the Bureau holds that the existence of an actual liability to pay the tax has not been established and that the item in question is therefore not allowable.

(b) This item represents interest on refund of Federal income tax.

(c) Depreciation on Plant and Equipment has been adjusted as follows:

Balance per books January 1, 1937		$540,248.63
Less: Appreciation		161,791.90
[fol. 13]		
Balance		$378,456.73
1937 Additions		5,294.07
Total		$383,750.80
Less: Land cost (plant site)		28,500.00
Balance		$355,250.80
Less:		
Estimated salvage 2½%	$ 8,881.27	
Reserve for depreciation as amended, December 31, 1936	160,544.50	169,425.77
Amount subject to depreciation		$185,825.03
Depreciation allowable (1/9 of $185,825.03)		$ 20,647.23
Depreciation deducted per return		19,383.14
Additional deduction		$ 1,264.09

Adjustment to Value of Capital Stock as Declared in your Capital Stock Tax Return for Year Ended June 30, 1937.

Value declared in return	$459,124.95
Increase in net income for income tax computation for year ended December 31, 1936	769.88
Value as adjusted	$459,894.83

Explanation of Adjustment

Net income for normal tax computation	$ 31,869.83
Less: Excess-profits tax	None
Net income for normal tax computation	$ 31,869.83
Less: Net income reported	31,099.95
Increase	$ 769.88

[fol. 14] Computation of Tax

Excess-profits Tax:	
Taxable net income	$ 65,587.26
Less: 10% of $459,894.83 value of capital stock as declared in your capital stock tax return for year ended June 30, 1937	45,989.48
Net income subject to excess-profits tax	$ 19,597.78
5% of declared value of capital stock	22,994.74
Balance	None
Excess-profits tax: 6% of $19,597.78	$ 1,175.87
Total excess-profits tax	$ 1,175.87
Excess-profits tax assessed: Original, account No. 40342	5.92
Deficiency of excess-profits tax	$ 1,169.95
Income Tax:	
Normal tax: Taxable net income	$ 65,587.26
Less: Excess-profits tax	1,175.87
Net income for normal tax computation	$ 64,411.39
Normal tax net income	$ 64,411.39
8% of $ 2,000.00 (Over 0 to $2,000.00)	$ 160.00
11% of $13,000.00 (Over $2,000.00 to $15,000.00)	1,430.00
13% of $25,000.00 (Over $15,000.00 to $40,000.00)	3,250.00
15% of $24,411.39 (Over $40,000.00)	3,661.71
Total normal tax	$ 8,501.71

Surtax on Undistributed Profits:		
Taxable net income		$ 65,587.26
Less:		
[fol. 15]		
Excess-profits tax	$1,175.87	
Normal tax	8,501.71	9,677.58
Adjusted net income		$ 55,909.68
Less: Dividends paid credit		46,587.00
Undistributed net income		$ 9,322.68
7% of $5,590.97		391.37
12% of $3,731.71		447.81
Total surtax		$ 839.18
Total normal tax		8,501.71
Total income tax (normal tax and surtax)		$ 9,340.89
Income tax assessed: Original, account No. 40342		5,740.80
Deficiency of income tax		$ 3,600.09

BEFORE UNITED STATES BOARD OF TAX APPEALS

ANSWER TO AMENDED PETITION—Filed August 2, 1940

Received August 2, 1940

[Title omitted]

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

[fol. 16] 2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits the allegations contained in paragraph 3 of the amended petition.

4. Denies that respondent's determination is based on errors as alleged in paragraph 4 of the amended petition.

5. Denies the material allegations of fact set forth in paragraph 5 of the amended petition.

Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

JHY

Of Counsel: James L. Backstrom, Division Counsel, Donald P. Moyers, Special Attorney, Bureau of Internal Revenue.

JHY:mkm. 7/29/40.

[fol. 17] PETITIONER'S EXHIBIT ONE

U. S. Board of Tax Appeals, Div. 3, Docket 103015

Admitted in Evidence Jan. 29, 1941

No. —

In the Chancery Court of Forrest County, Mississippi

DIXIE PINE PRODUCTS COMPANY, a Corporation, Complainant,

vs.

HOWARD DYER, Commissioner, Defendant

BILL OF COMPLAINT

To the Honorable Chancery Court of the Tenth Chancery District in and for Forrest County and State of Mississippi, the Honorable Ben Stevens, Chancellor:

Comes the Dixie Pine Products Company, a corporation, by its attorney, and complains of Howard Dyer, Commissioner, and for grounds of equitable relief, most respectfully shows unto the Court the following facts, to-wit:

The complainant herein is a corporation, incorporated under the laws of the State of Mississippi, with its principal

place of business in Hattiesburg, Forrest County, Mississippi. That as a corporation, its principal business is the manufacture of turpentine, pine oil and rosin from pine stumps taken from the lands in the territory surrounding and adjacent to the City of Hattiesburg.

That the defendant herein named is the Motor Vehicle Commissioner, duly appointed, qualified and acting, under the provisions of House Bill No. 94, being chapter 162 of the Acts of the regular 1936 session of the Legislature of the State of Mississippi. That the said defendant, as Commissioner, is charged with the duties specified in the aforementioned Act of the Legislature and has associates and [fol. 18] deputies working under him and under his direction, in accordance with the provisions of said law.

Complainant would show that it is engaged, as aforesaid, in the manufacture of turpentine, pine oil and rosin from the pine stumps taken from the ground in the territory adjacent to the City of Hattiesburg.

Complainant would further show that in the reduction of the said stumps and the distillate of the turpentine, pine oil and rosin and from the said stumps, it has a large plant, representing a very heavy investment, located in or near the city of Hattiesburg where it receives the said stumps delivered to its plant by the farmers and land owners in the territory adjacent to the City of Hattiesburg. That the said stumps so used in the manufacture of the said turpentine, pine oil and rosins, aforesaid, are removed from the farm lands in the clearing and preparation of the same for agricultural purposes and for the purpose of clearing uncleared lands of the said stumps. That in the use of and reduction of the said pine stumps in the distillation of the turpentine, pine oil and rosin, complainant is engaged in utilizing a waste product and making commercially valuable that which heretofore had been a liability to the land owners and expensive in removing the same from the lands. Complainant, by the process of distillation, and in the manufacture of said stumps, has turned into an asset for the farmers and land owners, who are now removing their stumps from their lands and obtaining a market therefor, sufficient to pay for the removal of the stumps and a small profit on the labor expended in so doing.

Complainant would further show that in the distillation of the stump wood, so as to obtain the turpentine, pine oil

and rosin therefrom, it feeds the said stumps into a machine, commonly called a Hog, which ships the said stumps [fol. 19] into small chips and shavings. These chips and shavings are subjected to an application of steam of a high temperature which takes out of the said chips and shavings the turpentine and pine oil, and thereafter, for the purpose of removing the rosin from the said chips, it is necessary for the chips and shavings to be treated by a solvent, or reducing agent. That for the purpose of so reducing the said chips and shavings and extracting the rosin therefrom, that complainant has a battery of reservoirs or tanks, holding from forty thousand to sixty thousand gallons of the solvent or reducing agent, into which the said chips and shavings are placed for the purpose of dissolving the rosin and extracting the same from the said chips and shavings.

Complainant would further show that, as a solvent to be used in the extracting or reducing the said chips and shavings, so as to obtain the resin therefrom, complainant has contracted with a refinery to manufacture a special liquid, designated as turpentine and rosin solvent, to be used by it in extracting and reducing the rosin out of and from the said chips and shavings.

Complainant would show that the said solvent is a petroleum product with a specific gravity of .56, at a temperature of 60 degrees fahrenheit. That the said solvent is a petroleum product; that it has a boiling range beginning at 230 degrees fahrenheit and vanishing at 290 degrees fahrenheit, so that the boiling range covers a variation in temperature of 60 degrees.

Complainant would further show that, in using the said solvent as a reducing agent, that it is necessary to distil the said solvent off and leave the said resin, and that said solvent is distilled off from the said rosin and does not form any part of the said products so being manufactured and in no wise becomes mixed with or a part of the said [fol. 20] rosin that is manufactured and sold on the market by complainant as a part of its manufactured product. That the said reducing agent has a boiling point above the boiling point of the turpentine and pine oil so that said solvent and pine products can be separated by the distilling process aforesaid. That in using the said solvent and distilling the same off there is a waste or loss of about five

gallons for each ton of wood, from which rosin is extracted by the complainant in its manufacturing plant. That complainant uses and extracts the turpentine, pine oil and rosin from about one hundred and twenty tons of pine stumps and wood each day, so that there is a loss or a waste of about six hundred gallons per day of the said solvent so used by complainant in its manufacturing operations.

Complainant would further show that it does not keep the said solvent in storage. That as it manufactures the said stumps and pine wood and as the said solvent is lost and wasted, at the rate of approximately six hundred gallons per day, as aforesaid, that it refills the containers from tank cars received from the refinery. That when the loss amounts to approximately ten thousand gallons and becomes so lowered in the retort as to make it necessary to replenish, that complainant imports from the said refinery, from without the state, in interstate commerce, over the railroad lines operating into Hattiesburg, as common carriers, a tank car of the said solvent, which is placed in the retort, refilling the retort to the desired amount to be used therein, which said amount is from forty thousand to sixty thousand gallons, as hereinbefore set forth.

Complainant would further show that it does not use the said solvent on the streets, public roads or highways of the State of Mississippi. It does not use the said solvent in an internal combustion engine and it does not sell, de- [fol. 21] liver or otherwise dispose of the said solvent; that it uses it only in the retorts, which are stationary, holding the said solvent through which the said chips and shavings of the said pine stumps and wood, as hereinbefore set out, are passed, for the purpose of dissolving the rosin therefrom.

Complainant would further show that gasoline usable in motor driven vehicles or internal combustion engines, has a boiling range beginning at 80 degrees fahrenheit and extends to 420 degrees fahrenheit, having a boiling range of 340 degrees, whereas the solvent used by this complainant, in its tanks and retorts for the extraction of the rosin from the pine chips and shavings, as hereinbefore set forth, has a boiling range of only 60 degrees running from 230 degrees fahrenheit to 290 fahrenheit, as hereinbefore set forth.

Complainant would further show that, because of the loss of the solvent, as hereinbefore set forth, in the extraction and reduction of the rosin in its manufacturing plant, it becomes necessary for this complainant to use large quantities of said solvent, ranging from fifteen thousand to twenty thousand gallons per month. That the said solvent is recaptured, as far as is possible, in the said operations, the said loss, however, amounts to approximately six hundred gallons per day, as hereinbefore set forth. That the loss, because of inability to recapture all of said solvent, is a total loss to complainant and is a manufacturing cost of said rosin so made by complainant. That the said solvent so lost, however, does not enter into nor become any part of the manufactured product, and the loss, therefore, is not in any wise compensated by increase in quantity nor in the price of the commodity manufactured and sold and no part of the said solvent is sold and no remuneration in any wise whatsoever is received therefor.

[fol. 22] Complainant would show that the defendant herein is the Motor Vehicle Commissioner, appointed by the Governor of the State of Mississippi, under the laws of the State, and as hereinbefore set forth, is duly qualified and acting as said Commissioner in the collection of the tax imposed upon gasoline and oils by the said Chapter 162 of the Mississippi Laws 1936. That in construing the said statute the said Commissioner has classified complainant as a distributor of gasoline under the provisions of section 5, paragraph (e) of the aforementioned Acts.

Complainant would further show that the said Commissioner, in his construction of section 8, paragraph (a), has assessed and is attempting to collect a tax of six cents per gallon on the solvent so used by the complainants in the manufacture of its turpentine, pine oil and rosin, as hereinbefore set forth. Complainant would show further that under section 6, the Commissioner is demanding that complainant shall make application to the Commissioner, upon the forms prescribed by him, and execute a bond, required by law, and to otherwise comply with the provisions of the statute, required of persons, firms or corporations, who are distributors, to qualify as a distributor of gasoline and to receive a permit to authorize complainant to engage in business as a distributor, as provided by section 7 of the said laws, hereinbefore referred to. And the said defendant seeks to compel complainant to so qualify before

complainant is permitted to receive and use the said solvent in its manufacturing business, as hereinbefore set forth.

Complainant would further show that it has received a car of the said solvent, shipped by the Refinery from Wichita Falls, Texas, shipped on July 28th, 1936, in car G. A. T. X. No. 2423, moving in interstate commerce and into Hattiesburg over the Mississippi Central Railroad, containing 7906 gallons of the said solvent. That the said solvent, when received, was immediately pumped into the [fol. 23] retorts of its system and used as a solvent therein. That the said Commissioner now seeks to impose the said tax of six cents per gallon on said solvent and to collect from complainant the sum of $474.36.

Complainant would further show that the said Commissioner denies to complainant the right, should complainant pay the said tax imposed thereon, of receiving a refund of the amount of tax paid, less one cent per gallon, unless complainant shall conform to the regulations provided in section 15, with all of its sub-divisions therein contained, of the said Laws, hereinbefore referred to.

Complainant would show that the said solvent that it is using is not gasoline, within the definition of section 5, paragraph (a) of the Laws of the State of Mississippi, Chapter 162, Acts of 1936, in that the said solvent is not used or usable in propelling motor vehicles, when used alone, and is not a liquid that is ordinarily and practically commercially usable in internal combustion engines for the generation of power, neither is it a distillate or a condensate of petroleum, natural gas, coal, coal tar, vegetable ferments and other products so usable in said internal combustion engines for the generation of power. Complainant reiterates, however, that the said solvent is a petroleum product and has a gravity test above 46 degrees Tagliaubes baume scale, at a temperature of 60 degrees fahrenheit. Complainant would show, however, that the said solvent could be mixed or blended with other petroleum products so as to make it usable in motor vehicles. To so make it usable a petroleum product with a boiling range beginning at 80 degrees fahrenheit, and vanishing at 230 degrees fahrenheit, and also a petroleum product with a boiling range beginning at 290 degrees fahrenheit and vanishing at 420 degrees fahrenheit, must be mixed or blended with said solvent. The mixing of said solvent with the two above described products, in the proper pro-

[fol. 24] portions, would make a petroleum product usable in motor vehicles or internal combustion engines, but complainant is not advised as to the proportions of each necessary to be used in mixing or compounding the same.

Complainant would further show that it is not a distributor, as defined by section 5, paragraph (e) of the above-mentioned laws, in that it does not sell or distribute gasoline or oil or the solvent in question for re-sale; that it does not manufacture, refine, distil, blend or compound gasoline or the said solvent, in this state, and complainant further shows that it is not importing, receiving, purchasing, acquiring, using, storing or selling gasoline or oil or the said aforesaid solvent in this state, on which a fuel excise tax has been imposed by the said Act; therefore, complainant is not using a product of petroleum on which a tax is imposed and which tax has not been paid or a bond to cover the payment thereof, has been made by a qualified distributor.

Complainant would show that, by section 8, paragraph (a) thereunder, that any person engaged in business as a distributor, as defined in the Act, shall pay for the privilege of engaging in such business, an excise tax equal to and imputed as follows:

(a) Six cents (6c) per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended or compounded or received in the state for sale, use on the highways, storage, distribution, use in internal combustion engines or for any commercial purpose. Complainant would show that the solvent herein sought, by the Commissioner, to be classified as a gasoline, is received by it in this state for its sole and only use, but that the said solvent is not used on the highways and is not used in internal combustion engines or for any commercial purpose. It is not stored nor distributed and, therefore, the [fol. 25] said solvent is not subject to the six cents (6c) tax imposed and is not included by the said statute, as being subject to the tax imposed, if, in all other respects, it came within the purview of the statute; for the reason that it is received by complainant from without the state, shipped in interstate commerce, for complainant's sole and only use, which use is not upon the highways or in internal combustion engines or commercial purposes, but as a solvent as is specifically hereinbefore set forth.

Complainant would show therefore that in addition to the fact that the said solvent, so used by it, is not gasoline, within the definition of section 5, paragraph (a) of the said Act, that if and should it be construed that the said definition referred to, is broad enough to include the said solvent, then the tax does not apply for the reason that it is received from without the state, in interstate commerce, to be used by the complainant in its own business and not upon the streets, public roads and highways of the state, nor in internal combustion engines or for commercial purposes and for that reason the said tax does not apply. The tax not applying to the said solvent, complainant is not a distributor within the definition of section 5, paragraph (e) of the said Act for the reason that the said solvent, so received and used by complainant, is not one on which a fuel excise tax, imposed by the Act; and is not a solvent on which an excise tax, imposed by the Act, has not been paid.

Complainant would further show that it cannot make application for a permit, as a distributor under section 6 of said Act, for the reason that it does not sell gasoline or oil and not selling gasoline or oil it could not approximate the amount expected to be sold monthly, as required by the Act, and, therefore, the application required by the statute, could not be made by complainant for a permit authorizing it to engage in business as a distributor.

[fol. 26] Complainant would show that it cannot establish a basis for a refund on the solvent used so as to obtain the refund of the excise tax of six cents less one cent per gallon, if the said excise tax of six cents per gallon were paid. That in order to establish a basis for a refund it would be necessary for complainant to fill out and file with the Commissioner an information blank, furnished by the Commissioner, giving a detailed description of the make, model, motor number, horsepower and the approximate per hour gasoline consumption of the machinery in which complainant intends to use the refund gasoline and in addition thereto to make an estimate of the amount of refund gasoline it intends to use each month, during the succeeding year. Since the solvent is not used in any machinery, internal combustion engine or for any other purpose, to generate power, there is no basis upon which complainant could establish the right to receive a refund for the said

tax, if it were required to or should voluntarily pay the same.

Complainant would further show that by section 35, of the aforementioned Act, the Legislature declared that, "for the purpose of this Act it will be prima facie presumed that all gasoline and oil, or either, as defined herein, imported, received, purchased, acquired, used, stored, manufactured, refined, distilled, blended, compounded, sold or distributed in the state, is intended for use in propelling motor vehicles on the public roads and highways and the tax liability in this Act is based on such presumption. "The Legislature thereby clearly showed an intention on its part to place an interpretation upon the excise tax so imposed as being for the use of the highways and in aid of the state roads.

Complainant would further show that the said Commissioner, using the prima facie presumption of the statute, is prima facie presuming that the said solvent, used by [fol. 27] complainant, is used on the highways. The defendant, therefore, is attempting to impose and collect the said tax on said solvent from complainant. The prima facie presumption must yield to the facts and the facts are that the said solvent is not used on the highways, in any sense and is used only in the crucible as a solvent and reducing agent for the extraction of turpentine and rosin from pine stumps and pine wood found only in the pine belt of the State of Mississippi, which has been denuded of its virgin timber.

Complainant would further show that it is not due the said six cents excise tax on the carload of solvent, containing 7906 gallons, hereinbefore set forth. The Commissioner has made demand on complainant for the payment of said tax, and will collect the same, unless he is restrained from so doing. That if the said excise tax is collected an irreparable injury will be inflicted upon complainant for the reason that it has not established a basis for a refund of the tax paid, less one cent per gallon thereon, and, therefore, it will sustain an operating loss to that extent. An irreparable injury would be sustained by complainant for the further reason that there is no provision of statute made for complainant to recover back the said sum of money so wrongfully collected from complainant.

Complainant would show that unless the said Commissioner is restrained from collecting the said tax that he will proceed to collect the same.

Complainant would show that the said laws, under consideration, are not to be interpreted so as to apply to the said solvent but if interpreted to apply to the solvent being used by complainant, it would render the said law violative of the constitution of the State of Mississippi and violative of the constitution of the United States, which [fol. 28] said unconstitutionality of the said Act, should such construction be placed thereon, by the Courts, is here specifically pleaded and relied on.

Wherefore the premises considered complainant prays that upon a hearing of this motion and bill of complaint that the Court may issue a temporary injunction, restraining the said Commissioner from collecting or attempting to collect the said excise tax from complainant on the solvent so used by it in the Manufacture of its products; that the proper process of the Court may issue, commanding the defendant to appear on a day certain, to plead, answer or demur to the material allegations of this bill of complaint, but not under oath, answer under oath being specifically waived; that upon a final hearing may the Court interpret the said statute and hold that complainant is not liable for the excise tax on the solvents used by it in the manufacture of its turpentine, pine oil and rosin, as set forth in this bill of complaint. And on a final hearing may the Court make the said temporary injunction, so issued, perpetual, forever enjoining the said Commissioner from collecting or attempting to collect an excise tax on the solvent so received by complainant, and used by it in its crucibles and retorts as a solvent and reducing agent, when not used on the highways of the State of Mississippi or in internal combustion engines or to be mixed, blended or compounded for such use, and if mistaken in the relief prayed for complainant prays the Court to grant unto it such other, further, general or special relief in the premises as, under all the facts and circumstances, herein set forth, it may be entitled to receive, and if it has prayed for an improper relief or the proper relief in an improper manner, then may the Court look through the form of the petition herein filed to the substance thereof and grant unto complainant such relief in

the premises, as under all of the facts set forth it may [fol. 29] be entitled to receive, whether specifically prayed for or not, and as to the Court may seem meet and proper; and as in duty bound complainant will ever pray.

Dixie Pine Products Company, by T. J. Wills, Attorney.

STATE OF MISSISSIPPI,
Forrest County.

Personally appeared before me, the undersigned authority in and for said county and state, T. J. Wills, who being first duly sworn, says on oath that he is the attorney for the Dixie Pine Products Company, a corporation, and as such attorney he is authorized, under the law to make oath to the above and foregoing bill of complaint, and affiant says that the matters and things set forth in the foregoing bill of complaint are true and correct, as therein stated.

T. J. Wills.

Sworn to and subscribed before me on this the 6th day of August, 1936. —— ——, Notary Public.

[fol. 30] PETITIONER'S EXHIBIT 2

U. S. Board of Tax Appeals, Div. 3, Docket 103015

Admitted in Evidence Jan. 29, 1941

No. 23438½

DIXIE PINE PRODUCTS COMPANY, a Corporation, Complainant,

vs.

HOWARD DYER, Commissioner, Defendant

FINAL DECREE

This cause coming on this term day to be heard on final hearing on original bill of complaint and demurrer by agreement of both parties and their attorneys of record,

and the Court having heard and duly considered the same, and being of the opinion that the demurrer to the original bill of complaint should be sustained and the bill dismissed.

It is, therefore, ordered, adjudged and decreed that the demurrer of Howard Dyer, Commissioner, defendant in the above styled cause, to the original bill of complaint of Delta Pine Products Company, a corporation, complainant, be and the same is hereby sustained, and complainant having declined to plead further, complainant's original bill of complaint is hereby dismissed with prejudice, to which action complainant excepts and prays for an appeal, which is hereby granted.

It is further ordered, adjudged and decreed that complainant pay all costs, for which let execution issue.

Ordered, adjudged and decreed this the 15 day of August, 1936.

——— ———, Chancellor.

[fol. 31] PETITIONER'S EXHIBIT 3

U. S. Board of Tax Appeals, Div. 3, Docket 103015

Admitted in Evidence Jan. 29, 1941

In the Chancery Court of the First Judicial District of Hinds County, Mississippi

DIXIE PINE PRODUCTS COMPANY, a Corporation, Complainant,

vs.

HOWARD DYER, Commissioner, Defendant

ANSWER TO BILL OF COMPLAINT

And now comes defendant, Howard Dyer, Commissioner, and in answer to complainant's bill of complaint would show this Honorable Court the following:

Defendant admits that complainant is a corporation incorporated under the laws of the State of Mississippi with principal place of business in Hattiesburg, Mississippi, and

that complainant is engaged in the manufacture of turpentine, pine oil and rosin from pine stumps.

Defendant admits that he is the duly appointed qualified and acting Motor Vehicle Commissioner and as such is charged with the duties specified in Chapter 162 of the 1936 Regular Session Laws of the Missippi Legislature.

Defendant admits that complainant is engaged in the manufacture of turpentine, pine oil and rosin from pine stumps in Mississippi and that some of said products are sold in export trade and shipped to foreign countries, but avers that many of said products are sold in Mississippi for use in Mississippi.

[fol. 32] Defendant admits the method of manufacturing turpentine, pine oil and rosin, which is set out in paragraphs 5 and 6 of complainant's bill of complaint.

Defendant neither admits nor denies that complainant has contracted with a refinery to manufacture a special liquid designated as turpentine and rosin solvent to be used by complainant in the manufacture of turpentine, pine oil and rosin, but denies that said solvent is not generally manufactured and sold on the market.

Defendant admits that said solvent used by complainant is a petroleum product with a specific gravity of 56 degrees T. B. scale at a temperature of 60 degrees Fahrenheit, and that it has a boiling range beginning at 230 degrees Fahrenheit and vanishing at 290 degrees Fahrenheit.

Defendant admits that in using said solvent as a reducing agent it is necessary to distill the said rosin off and leave the said solvent, and that said rosin is distilled off from the said solvent and the said solvent does not form any part of the product being manufactured and sold on the market by complainant. Defendant neither admits nor denies that there is a loss of five gallons of solvent for each ton of wood treated, and neither admits nor denies that there is a loss or waste of about six hundred gallons per day of said solvent by complainant in its manufacturing operations.

Defendant denies that complainant does not keep the said solvent in storage, but avers that said solvent is kept by complainant in reservoirs and tanks in the State of Mississippi and that such keeping amounts to a storage within the meaning of Chapter 162 of the 1936 Laws of

Mississippi. Defendant admits that complainant imports its solvent from without the State of Mississippi in interstate commerce into Hattiesburg, Mississippi, but avers [fol. 33] that said solvent comes to rest in Hattiesburg, Mississippi, where its interstate journey ceases, and that after having come to rest it is received and stored by complainant in the State of Mississippi.

Defendant admits that the complainant does not use said solvent on the streets, public roads or highways of the State of Mississippi, nor in an internal combustion engine, but denies that complainant does not use said solvent for a commercial purpose. In this connection, defendant avers that said solvent is used by complainant for a commercial purpose within the meaning of Section 8, Sub-section (a), Chapter 162 of the Mississippi Laws of 1936, in that said solvent is used in the manufacture of turpentine, pine oil and rosin by complainant, and that after said products have been manufactured they are sold by complainant on the open market. Defendant alleges that complainant's business is that of manufacturing and selling turpentine, pine oil and rosin, and that the solvent is used by complainant in furtherance of this business.

Defendant denies that gasoline usable in motor-driven vehicles or internal combustion engines has a boiling range beginning at 80 degrees Fahrenheit and extending to 420 degrees Fahrenheit, having a boiling range of 340 degrees, but avers that gasoline as defined in Section 5 of Chapter 162 of the 1936 Laws of Mississippi include petroleum products such as the solvent used by the complainant which has a boiling range of only 60 degrees, running from 230 degrees Fahrenheit to 290 degrees Fahrenheit.

Defendant neither admits nor denies that complainant uses large quantities of said solvent, nor does defendant admit or deny that said solvent is recaptured. Defendant admits that the solvent does not become a part of the manufactured product and admits that the manufactured [fol. 34] product of turpentine, pine oil and rosin is sold by complainant on the market.

Defendant admits that he, as Motor Vehicle Commissioner, of Mississippi, has construed Chapter 162 of the 1936 Laws of Mississippi as including and classifying complainant as a distributor of gasoline under the provisions

of Sub-section 3 of paragraph (e) of Section 5 of Chapter 162 of the 1936 Laws of Mississippi.

Defendant admits that he, as Motor Vehicle Commissioner, in his construction of Section 8, Paragraph (a) of Chapter 162 of the 1936 Laws of Mississippi is attempting to collect a tax of 6¢ per gallon on the solvent used by complainant in the manner set out in complainant's bill of complaint.

Defendant admits that he, as Motor Vehicle Commissioner, has demanded that complainant comply with said Chapter 162 as a distributor within the meaning of said chapter. Defendant avers that complainant is a distributor within the meaning of sub-section 3 of paragraph (e) of Section 5 of said Chapter 162 of the 1936 Laws of Mississippi, for the reason that complainant has imported, received, acquired, used and stored in Mississippi gasoline on which the fuel excise tax imposed by Chapter 162 has not been paid, and the payment of which tax has not been covered by the bond of a qualified Mississippi distributor. Defendant further avers that by virtue of being a distributor under said Chapter 162 complainant should be made to comply with the various provisions of said chapter governing distributors.

Defendant admits that complainant received a car of the said solvent shipped by a refinery from Wichita Falls, Texas, on July 28th, 1936, in car G. A. T. X. No. 2423 over the Mississippi Central Railroad, containing 7906 gallons [fol. 35] of said solvent. Defendant admits that said solvent was received by complainant in Mississippi and was pumped immediately into the tanks of complainant in Mississippi. Defendant avers that on being received by complainant in Mississippi and placed in complainant's tanks that the solvent ceased its interstate journey and came to rest in Mississippi. Defendant further avers that after said solvent had come to rest in Mississippi and had been received by complainant that it was stored within the meaning of Chapter 162 in complainant's tanks and reservoirs in Mississippi. Defendant admits that he is seeking to impose a tax of 6¢ per gallon on said solvent and to collect from complainant the sum of $474.36, and avers that complainant owes said sum to the State of Mississippi by virtue of the fact that said sum is imposed as a tax and penalty on complainant under Chapter 162 of the 1936 Laws of

Mississippi for the reason that complainant by receiving said car became a distributor and that complainant did not pay the said tax owed on said solvent within the time required by law, or at any time. Defendant admits that said solvent was not purchased from a qualified Mississippi distributor, and that no tax has been paid on said solvent, and that the payment of said tax is not covered by the bond of a qualified Mississippi distributor as the term "distributor" is defined in Chapter 162, Laws of 1936.

Defendant denies that complainant should not pay to defendant the said tax imposed on said solvent, but avers that said tax, plus a penalty of twenty-five per cent thereon, is due by complainant to defendant under said Chapter 162.

Defendant admits that should complainant pay the said tax that defendant would require complainant to conform to all of the provisions of Section 15 of Chapter 162 of the 1936 Laws of Mississippi before defendant would grant any refund on said solvent.

[fol. 36] Defendant denies that said solvent is not gasoline within the definition of Section 5, Paragraph (a), Chapter 162 of the 1936 Laws, and denies that said solvent is not usable in propelling motor vehicles when used alone and denies that it is not a liquid that is ordinarily and practically commercially usable in internal combustion engines for the generation of power, and denies that it is not a distillate or condensate of petroleum so usable in said internal combustion engines for the generation of power. In this connection, defendant avers that said solvent is gasoline within the definition of said Chapter 162, and avers that said solvent is a liquid petroleum fuel that is practically, ordinarily and commercially usable when used alone or when blended for the generation of power in internal combustion engines, and in propelling motor vehicles, and that when so used alone or blended said solvent will operate an internal combustion engine or propel a motor vehicle with power and efficiency and without mechanical injury thereto. Defendant admits that said solvent is a petroleum products, has a gravity test above 46 degrees tagliaubes baume scale at a temperature of 60 degrees Fahrenheit, and admits that said solvent could be mixed or blended with other petroleum products so as to make it usable in motor vehicles. Defendant denies that to make said sol-

vent usable it would be necessary to blend said solvent with a boiling product having a boiling range beginning at 80 degrees Fahrenheit and vanishing at 230 degrees Fahrenheit, and a petroleum range beginning at 290 degrees Fahrenheit and vanishing at 420 degrees Fahrenheit. Defendant denies that to mix or blend said solvent would cost more than twice the cost of gasoline on the open market. Defendant admits that said solvent will start an internal combustion engine or motor in a motor vehicle when said engine or motor has been previously heated but denies that said solvent will not start a cold engine or motor. Defendant admits that said solvent when used alone will run an internal combustion engine or propel [fol. 37] a motor vehicle, but denies that the acceleration would be poor and the mileage power so low that the use of said solvent for said purpose would be impracticable. Defendant avers that the cost of said solvent is approximately 6 and 6/10 cents per gallon at the refinery and that the cost of the gasoline most commonly used in propelling motor vehicles is 6 cents per gallon at the refinery. Defendant further alleges that said solvent can be mixed or blended in equal proportion with kerosene costing four cents per gallon at the refinery, casinghead gasoline costing four cents per gallon at the refinery, and that the resulting product which has thus cost four and six-tenths cents per gallon is, in starting and propelling a motor vehicle or running an internal combustion engine, the equivalent in power, mileage and efficiency of gasoline selling at the refinery for six cents per gallon. Thus it is practical and commercially desirable to blend said solvent with kerosene and casinghead gasoline as here set out and the resulting product is ordinarily, practically and commercially usable either in operating an internal combustion engine for the generation of power or in propelling a motor vehicle. Defendant further alleges that said solvent can be mixed with casinghead gasoline in the proportion of one gallon of solvent to two gallons of casinghead gasoline and that the resulting product which has thus cost only four and six-tenths cents per gallon is, in starting and propelling a motor vehicle or in running an internal combustion engine for the generation of power, the equivalent in power, mileage and efficiency with gasoline selling at the refinery for six cents per gallon, and

it is thus practical and commercially desirable to blend said solvent with casinghead gasoline and the resulting product is ordinarily, practically and commercially usable in internal combustion engines for the generation of power or in propelling a motor vehicle.

[fol. 38] Defendant denies that complainant is not a distributor as defined by Section 5, paragraph (e) of said Chapter 162, but alleges and avers that complainant is a distributor within said meaning for the reason that complainant has imported, received, purchased, acquired, stored and used said solvent which is gasoline under said Chapter 162 without paying any tax on said solvent, and the tax on which solvent is not covered by the bond of a qualified Mississippi distributor. Defendant avers that by virtue of being a distributor complainant is liable to defendant for 6c per gallon for each gallon of solvent received and stored or used by complainant in Mississippi.

Defendant denies that complainant cannot apply for a permit as a distributor under said Chapter 162, and denies that said permit could not be issued to complainant.

Defendant denies that complainant could not establish a basis for refund on the solvent by complying with Section 15 of said Chapter 162, but alleges that this fact is not involved in this action.

Defendant denies the conclusions of law alleged by complainant in its bill of complaint and alleges that said conclusions of law are not properly contained in said bill and that it is unnecessary to deny the same.

Defendant denies that complainant does not owe 6c per gallon excise tax on the carload of solvent containing 7906 gallons, mentioned in complainant's bill of complaint, but alleges that said tax, plus a penalty of twenty-five per cent thereon, is due to the defendant by complainant. Defendant admits that he has made demand on complainant for the payment of said tax and will collect the same unless he is restrained from so doing, but denies that the collection of this tax will cause irreparable injury to complainant.

[fol. 39] Defendant denies that a construction of said Chapter 162 so as to impose a tax on complainant in the instant case would violate either the Constitution of the State of Mississippi or the Constitution of the United States.

Defendant denies that complainant is entitled to either a temporary or a final and permanent injunction as prayed for in complainant's bill of complaint.

Defendant prays that this Honorable Court refuse the relief prayed for by complainant, or any other relief for complainant.

And so having made such answer as he deemed and considered meet and proper, defendant respectfully prays that he be allowed to go without cost.

Howard Dyer, Commissioner, Defendant, By Greek L. Rice, Attorney General, By Wm. H. Maynard, Assistant Attorney General, Attorneys for Defendant.

State of Mississippi,
County of Hinds.

This day personally appeared before me, the undersigned authority in and for the above County and State, Joe Jeith, Assistant Motor Vehicle Commissioner of the State of Mississippi, who, after being duly sworn by me states that he has read the foregoing answer and that the matters and facts are true and correct as therein stated.

—— —— Assistant Motor Vehicle Commissioner.

[fol. 40] Sworn to and subscribed before me, this the 15th day of May, 1937.

—— —— Supreme Court Clerk.

PETITIONER'S EXHIBIT 4

U. S. Board of Tax Appeals, Div. 3, Docket 103015

Admitted in Evidence Jan. 29, 1941

No. —

In the Chancery Court of Hinds County, Mississippi

DIXIE PINE PRODUCTS COMPANY, a Corporation, Complainant,

vs.

HOWARD DYER, Commissioner, Defendant

AGREED STATEMENT OF FACTS

It is hereby stipulated and agreed by and between T. J. Willis, attorney for the complaint, and E. R. Holmes, Jr., Assistant Attorney General for the State of Mississippi, for

and on behalf of the defendant, that the following statement of facts are the facts in this case and are to control in the decision of the case, submitted upon a bill of complaint, answer and proof.

That the complainant is engaged in the naval stores business, with its place of business in the City of Hattiesburg. That in the conduct of its business in the naval stores operations that it extracts turpentine, pine oil and resin from the dead wood of the stumps, tops and waste wood left of the pine forests after the timber has been cut and lumbered therefrom.

[fol. 41] That in the operation of the naval stores business the resin is extracted from the pine wood by being dissolved in a substance specially prepared for that purpose. That in order to commercially extract the resin from the wood it is necessary to use a substance that will dissolve the resin and after the resin has been dissolved from the wood to be easily separated from the solvent by distillation.

That in the operation of the business the complainant has made for it and it uses a solvent made from petroleum products. That the initial boiling point of the said product is 230 degrees Fahrenheit or thereabout. That the vanishing point or the point at which the entire solvent passes into a vapor is 290 degrees or thereabout. That the solvent so used thus has a boiling range of approximately 60 degrees Fahrenheit.

That the complainant purchases the greater portion, if not all of its solvent from the American Mineral Spirits Company of Chicago, Illinois. That it buys the said solvent in tank car lots, outside of the State of Mississippi and that the said tank cars are shipped in over the railroads of the state and move in interstate commerce to complainant's plant. That the said solvent is pumped from the tank cars, which hold from 8000 to 10000 gallons each, into the reservoir of the plant, in which the pine wood is placed and the resin dissolved therefrom. That the complainant has no storage tank and does not store the said solvent otherwise than to pump it from the tank cars, when received in shipment, into the reservoir where it is mixed with other solvents, that are [illegible] being used, and is so pumped into the reservoir to replenish the solvent that is lost by evaporation and waste in the operations. That the said reservoir holds approximately 60,000 gallons of the solvent and that when by waste, evaporation, etc. the amount is reduced

by approximately 8 to 10 thousand gallons, a new tank car [fol. 42] of the solvent is received, by previous arrangement, and is pumped from the tank car into the reservoir, thus adding about 1/6 volume of the newly received solvent to the 5/6 remaining in the reservoir.

That in the operation the solvent is used over and over and over, the resin being separated by the process of distillate, having a boiling point different from that of the solvent in which the resin is dissolved. That in the distillate process it is impossible to completely separate the solvent and the resin so that at all times the solvent has a large percentage of resin suspended in dissolution that does not readily separate by distillation, so that the said solvent is heavily charged with the resin, which is a carbon compound.

It is further agreed that gasoline, as defined by Chapter 163, Laws of 1936, is free from water and suspended matter and that 10% shall be recovered when the thermometer does not read in excess of 176 degrees Fahrenheit, nor less than 122 degrees Fahrenheit. That 50% shall be recovered when the thermometer reads 284 degrees Fahrenheit. That 90% shall be recovered when the thermometer reads 392 degrees Fahrenheit and that the end point shall not be higher than 437 degrees Fahrenheit. It is agreed that gasoline has an initial boiling point of approximately 100 degrees Fahrenheit and a varishing point of approximately 432 degrees Fahrenheit.

It is further agreed that in starting a motor driven vehicle that the low vaporization point of the fuel is necessary in order to start the unheated motor. That where motor fuel does not have an initial vaporizing point of less than 230 degrees Fahrenheit, it is more difficult to start an unheated motor. That the solvent here in question has an initial vaporizing point of 230 degrees Fahrenheit.
[fol. 43]. It is further agreed that the heated motor gains its power of mobility from the motor fuel with a high volatile temperature so that the greater mobilization of the motor vehicle is gained from that portion of the fuel which has a boiling range of from 300 degrees to 400 degrees fahrenheit.

It is agreed that the solvent will propel a gasoline motor when the motor is heated and that it will run the said motor, after the motor has been heated, but because of its low boiling range or vanishing point that it does not give

to the motor the pulling power that gasoline, as defined by Chapter 163, Acts of the Legislature of 1936, gives. That when transferred from the tank cars into the solvent tanks of the complainant company and there mixed with the solvent saturated with resin, that because of the carbonous composition of the resin the said solvent is thereby made unusable even in mixtures and blends for a motor vehicle fuel.

It is agreed that by tests the said solvent, when placed in an automobile where the motor has already been heated that it will run an automobile along the paved highway and will attain a mileage almost as great per gallon as gasoline.

It is further agreed that the solvent has a specific gravity of 56 T. B. scale at a temperature of 60 degrees fahrenheit and is manufactured from and is a petroleum product.

It is further agreed that the complainant does not use the said solvent in driving stationary engines or propelling motor vehicles of any kind or character over the highways of the State of Mississippi, or over its private property. That to this complainant the use of said solvent is impractical and unavailable because it is immediately mixed in its solvent tanks, which contain resin.

It is agreed that in the manufacture of the solvent that that part of petroleum distillates that volatilizes between [fol. 44] a temperature of between 230 degrees fahrenheit and 290 degrees fahrenheit is used and that the manufacture of said solvent is much more expensive than the manufacture of gasoline so that it sells for considerably more by the manufacturer than gasoline can be purchased from the refineries.

It is agreed that solvent can be mixed with gasoline in varying proportions and can be used in propelling motor vehicles or in internal combustion engines, either when so mixed or alone. It will start an unheated motor in average or ordinary weather conditions, either alone or mixed with gasoline, but, solvent, either alone or when mixed with gasoline will not propel a motor vehicle or start a motor as rapidly or as easily as gasoline. Solvent will start, run and accelerate a motor vehicle, but not as rapidly or as easily as gasoline, or when mixed with gasoline, but the higher the proportion or percent of gasoline in the mixture, the easier the starting of the motor and the more miles per gallon will be obtained.

It is further agreed that no substitute has been found or is available for use as a solvent to separate the resin in the pine stumps, and other waste material, of the yellow pine area of the state, for this solvent and that the only other methods used by other concerns are patented processes, which are not available to any naval stores plant other than the patentee. That a denial of the use of this solvent in the manufacture of naval stores products or a discriminatory tax thereon, prohibitive in its effect might effectuate a monopoly in the manufacture of wood resin in the hands of the patentee of the patented process of removing resin from the waste wood and on which patented substance and process no tax has been levied.

This the 6th day of December, 1938.

T. J. Wills, Attorneys for Complainant. Greed L. Rice, Atty. Genl., E. R. Holmes, Jr., Asst.

[fol. 45] PETITIONER'S EXHIBIT 5

U. S. Board of Tax Appeals, Div. 3, Docket 103015

Admitted in Evidence Jan. 29, 1941

DIXIE PINE PRODUCTS Co., Plaintiff,

vs.

HOWARD DYER, Motor Vehicle Commissioner, Defendant

FINAL DECREE

This day this cause came on to be heard on Bill of Complaint and the answer of the defendant and the agreed statement of facts, stipulated by the parties hereto, and it appearing to the Court, that the defendant, as motor vehicle commissioner has assessed the complainant with the gasoline tax imposed by Chapter 162 Laws of 1936 on the solvent used by the complainant in extracting rosin from the pine stumps and other wood in its, naval stores plant at Hattiesburg, Mississippi, by distress as provided by said act of the Legislature, and that he will so collect the said tax unless restrained from so doing; and it further appearing to the Court that the decision of the said Motor Vehicle Commissioner in assessing said tax on said solvent

is erroneous and unwarranted under the said law and should be reversed; and that he, the said defendant should be enjoined from assessing said tax and collecting or attempting to collect the same.

It is therefore ordered that the decision of the defendant to make the assessment of the said gasoline tax under Chapter 162 laws of 1936 on the said solvent be and the same is hereby reversed and canceled and held for naught; and that the defendant, Howard Dyer; Motor Vehicle Commissioner be and he is hereby forever enjoined from assessing said tax against the complainant on the solvent [fol. 46] so used by it in its retorts for extracting the rosin from pine stump and wood and enjoined from collecting or attempting to collect said tax on said solvent.

It is further ordered that the defendant pay all costs of suit.

Done, ordered and decreed in open Court this the 21 day of December, A. D. 1938.

V. J. Stricker, Chancellor.

Copy: Filed: 12/21/38:

W. W. Downing, Clerk.

Attest: A true copy:

W. W. Downing, Clerk.

12/21/38:

J. F. Vaughn, D. Cl.

[fol. 47] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103015

DIXIE PINE PRODUCTS COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Promulgated October 7, 1941

Deduction—Taxes—Accrued and Later Held Not Due.—The petitioner, which refused to pay a state gasoline tax on solvent used by it, but made a closing accrual upon advice of counsel, was not entitled to deduct the amount of the accrual as taxes for 1937 where the Court later decided that the tax never applied to the solvent.

T. J. Wills, Esq., R. G. Wooton, C. P. A., and H. B. Kelleher, Esq., for the petitioner.

Donald P. Moyers, Esq., for the respondent.

The Commissioner has determined deficiencies in income and excess profits taxes of $3,600.09 and $1,169.95 for the calendar year 1937. The issue is whether the petitioner may deduct in 1937 state gasoline tax which it accrued in that year but never paid, contending successfully that the law did not apply.

Findings of Fact

The petitioner, a corporation, filed its tax return for the period in question with the collector for the district of Mississippi.

The petitioner was engaged in the business of extracting turpentine, pine oil, and resin from stumps and other waste wood. A quantity of solvent made from petroleum products was used by the petitioner in this process. The Assistant Motor Vehicle Commissioner of Mississippi, contending that this solvent was usable in the operation of motor vehicles, assessed a state gasoline tax in 1936 on the solvent received and used by the petitioner in that year. This tax was levied under sections 5(a) and 8(a) of chapter 162, Laws of Mississippi, 1936, wherein "gasoline" is defined as follows:

[fol. 48]

> * * * The word "gasoline" as used in this act shall include all liquid fuels which are used or usable in propelling motor vehicles, either when used alone or when mixed, blended, or compounded, including liquids ordinarily, practically and commercially usable in internal combustion engines for the generation of power, and all distillates of, and condensates from petroleum, natural gas, coal, coal tar, vegetable ferments, and other products so usable and received in this state, having a gravity test above 46° taglianbes baume scale, at a temperature of 60° F.

The petitioner paid the tax assessed for 1936. Other companies engaged in similar business also paid taxes assessed on them for the use of the solvent.

A bill of complaint against the Motor Vehicle Commissioner of Mississippi was filed by the petitioner on August 6, 1936, in the Chancery Court for Forest County, Mississippi, in which it alleged that the nature of the solvent and the use to which it was put did not fall within the taxing

statute and asked for temporary and permanent injunctions against the future collection of the tax. It alleged, further, that the tax was on interstate commerce and that the exaction of it would be in violation of the Constitutions of the United States and the State of Mississippi. The Motor Vehicle Commissioner demurred to the bill of complaint and, on August 15, 1936, the demurrer to the bill was sustained by the Court.

[fol. 49] An appeal from the decree sustaining the demurrer was taken by the petitioner to the Supreme Court of Mississippi. That Court on January 25, 1937, reversed the action of the Chancery Court in sustaining the demurrer and remanded the case to the lower Court. *Dixie Pine Products Co. v. Dyer*, 177 Miss. 873; 172 So. 145. The Court stated in its opinion:

> The bill of complaint herein clearly alleges that the solvent or reducing agent used by appellant is not used in propelling motor vehicles, and is not ordinarily, practically, and commercially usable in internal combustion engines or in propelling motor vehicles, and states the facts upon which these allegations are based, and consequently upon the pleading here we think it must be held that this solvent does not come within the definition of gasoline upon which a tax is imposed by section 8 (a) of the act. The demurrer interposed to the bill of complaint should, therefore, have been overruled, and the decree of the Court below will be reversed and the cause remanded.

The petitioner, after the date of this decision, denied that it owed and ceased to pay gasoline tax on the solvent used by it. The Motor Vehicle Commissioner continued to assess and demand payment of the tax throughout 1937. The Motor Vehicle Commissioner advised the taxpayer then that he was uncertain whether the tax was due for the use of the solvent and that the determination of liability was then dependent upon the final decision of the Court. Other concerns using solvent in a similar process, with one exception, paid gasoline taxes assessed in 1937 for its use.

The Motor Vehicle Commissioner, after the decision of the Supreme Court of Mississippi in January 1937, prepared evidence and argument to support its position that

the tax was due. He secured from the petitioner a sample [fol. 50] of its solvent and tested its ability to run an automobile engine. He filed an answer to the bill of complaint on May 15, 1937, in which he denied that the petitioner was not liable for the tax and that it was entitled to an injunction. The Motor Vehicle Commissioner was represented in this action by the Attorney General of Mississippi and his assistant.

The petitioner and the Attorney General of Mississippi, on December 6, 1938, filed an agreed statement of facts in the action brought by the petitioner and, on December 21, 1938, the Chancery Court of the First Judicial District of Hinds County, Mississippi, rendered its final decree perpetually enjoining the Motor Vehicle Commissioner from assessing gasoline tax under chapter 162 of the 1936 Laws on the solvent used by the petitioner. This result was affirmed by the Supreme Court of Mississippi on October 23, 1939. *Dyer v. Dixie Pine Products Co.*, 186 Miss. 567; 191 So. 429. The Mississippi State Legislature, in its regular 1938 session, by enactment exempted the solvent used by the petitioner from gasoline tax from and after June 1, 1938.

The petitioner keeps its books and files its income tax returns on an accrual basis. Entries accruing the gasoline tax assessed on it by the Motor Vehicle Commissioner were directed to be made by the petitioner's attorneys by letter dated in December 1937. The entries were made at some time between January 1 and March 15, 1938, as of December 31, 1937, in the course of closing and auditing the 1937 books. The amount of the tax thus accrued for 1937 was $20,839.38. This amount was deducted by the petitioner on its income tax return for 1937. The petitioner never paid the taxes. The Commissioner disallowed the deduction.

The amount of $20,839.38 was included in the petitioner's 1938 income on its tax return, in view of the decree of December 1938, as recovery.

[fol. 51]

OPINION

MURDOCK:

This case is similar in some respects to *J. M. Dougherty's Sons, Inc.*, 42 B. T. A. 892, and *Estate of David Davies*, 42 B. T. A. 965. The *Dougherty's Sons, Inc.*, case has recently been reversed, 121 Fed. (2d) 700. However, the present

case has points of difference from the *Dougherty's* case and is like some other cases of the Board which have been affirmed by other Circuit Courts. It is not a case of an unconstitutional tax, but one of mistake in thinking that a taxing act applied to this petitioner. *Inland Products Co.*, 10 B. T. A. 235; affd., 31 Fed. (2d) 867. Cf. *Mary W. Leach*, 16 B. T. A. 781; affd., 50 Fed. (2d) 371. The tax was never due and the efforts to collect it were all a mistake, as the Court finally decided the law did not apply. The collector admitted his doubt after the decision on the demurrer. The petitioner, believing that no tax was due, ceased and refused to pay, and only made a closing accrual upon advice of counsel. The Commissioner determined that the 1937 taxes were not deductible from income as a properly accrued expense of that year. We hold, upon authority of the cases cited above, that he did not err.

Reviewed by the Board.

Decision will be entered for the respondent.

SMITH dissents.

(Seal)

[fol. 52] BEFORE UNITED STATES BOARD OF TAX APPEALS.
Washington

Docket No. 103015

DIXIE PINE PRODUCTS COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the determination of the Board as set forth in its findings of fact and opinion promulgated October 7, 1941, it is

Ordered and Decided: That there are deficiencies in income and excess-profits taxes for the calendar year 1937 in the respective amounts of $3,600.09 and $1,169.95.

(Signed) J. E. Murdock, Member. (Seal.)

Enter: Entered Oct. 11, 1941.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR REVIEW

Received December 22, 1941

Filed January 9, 1942

(Title Omitted)

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes the Dixie Pine Products Company, a corporation, by T. J. Wills, its attorney, and respectfully shows:

I

The petitioner herein referred to as the tax payer, is a resident of the City of Hattiesburg, County of Forrest, [fol. 53] and State of Mississippi and its post office address is Hattiesburg, Mississippi.

Respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States and herein referred to as the Commissioner.

The tax payer filed an income tax return for the taxable year of 1937 with the Collector of Internal Revenue for the District of Mississippi, whose office is located within the Fifth Judicial Circuit wherein the tax payer also resides.

II

The Commissioner determined a deficiency in income and excess profit taxes against the tax payer for the year 1937 in the amount of $4770.04, and thereafter, in accordance with the provisions of the applicable statute, sent to the tax payer, by registered mail, a notice of said deficiency.

Thereafter, within the time provided by law, this petitioner filed a petition for review from the said notice of deficiency with the United States Board of Tax Appeals. The case was, in due course, submitted to the Board upon evidence, exhibits and stipulations of fact for its finding and decision. On the 7th day of October, 1941, the Board promulgated its finding of fact and opinion in said proceedings and entered a judgment and final

order therein whereby it ordered and decided that there was a deficiency of $3600.09 in the tax payer's income taxes for the year 1937 and deficiency of $1169.95 in its excess profit taxes for the said year.

III

The deficiencies in the tax payer's income taxes and its excess profit taxes, which were in controversy before the [fol. 54] Board of Tax Appeals, arose and resulted from the determination of the Commissioner that the sum of $20,840.12, which the tax payer accrued for gasoline taxes, assessed by the State of Mississippi, upon solvent used in its manufacturing plant, was not deductible from its gross income as a proper accrual of a tax levied by the State of Mississippi deductible from the said gross income in determining its net income subject to taxation.

Chapter 162 Laws of 1936, State of Mississippi, impose an excise tax on gasoline and oils usable in propelling motor vehicles. The tax payer was engaged in the naval stores business. There were four other companies in the State of Mississippi so engaged in the naval stores business. All five of the companies, so engaged in naval stores business, used a petroleum product which has been referred to as a cut of gasoline, as the solvent in which to dissolve the rosin from the cut up chips. The five naval stores companies, acting in concert, had not paid a gasoline tax on this solvent.

The 1936 session of the Legislature appointed a roving committee to look into the collections and payment of gasoline tax. A tax similar to the 1936 tax had been imposed by the Legislature in 1932. This roving committee back assessed the five naval stores companies, operating in the State, with this gas tax for the four previous years under the 1932 act. Finally they compromised with the five naval stores companies on ¼ of one per cent per gallon, the tax being 6¢ per gallon with a 25% penalty. This settlement so affected was for the period ending May 1st, 1936. The Legislature in 1936 created a Motor Vehicle Commissioner and re-enacted the gasoline tax acts. The Motor Vehicle Commissioner levied the tax re-enacted in Chapter 162 of the Laws of 1936 and demanded payment thereof.

[fol. 55] This tax payer, along with the other naval stores companies, paid the tax for 1936. However, this tax payer

filed a suit to enjoin the collection of the tax. On the filing of this suit, and while it was pending for the year 1937, this tax payer refused to pay to the State of Mississippi the tax so assessed. The other four naval stores companies continued to pay the tax. The reason this tax payer refused to pay the tax was because there was no provision in the law for a refund of the tax, should it be successful in enjoining the collection of the tax, the tax previously paid having gone into the State Treasury. The other tax payers continued to pay the tax during 1937.

This tax payer was on an accrual basis and the amount necessary to pay the tax assessed and demanded by the State, should the litigation be finally terminated against this tax payer, was the amount of $20,840.12. This amount was accrued by the tax payer since it was on the accrual basis as taxes demanded, the collection of which was sought to be enjoined.

The other tax payers continued to pay the tax and when in 1938 this tax payer was successful in enjoining the collection of the tax, it transferred from its accrued tax account, the said amount so accrued, to its recaptured account. The other tax payers, similarly situated with this tax payer, had paid their tax into the State Treasury and had taken credit on their income tax and in all things had acted as this tax payer had with the exception that in accruing their tax they paid it into the State Treasury while this tax payer accrued his tax but refused to pay it in. The Legislature, by chapter 98, Laws of 1940, appropriated funds and authorized the Motor Vehicle Commissioner to refund the tax that had been paid in by the other four naval stores companies, under the statute, and they then in turn received a refund of the tax they had paid and placed it in their returns in the same manner [fol. 56] that this tax payer handled the accrued tax in controversy in this deficiency tax assessment.

In the findings, opinion and final decision of the Board, above mentioned, the Commissioner's contention is upheld and the tax payer is denied the deduction of said sum from its gross income for 1937 although the said deductions, when the final adjudication was had, were placed in the income for 1938 as recaptured tax accrual and returns made thereon in the 1938 return. The tax payer says that in this the Board of Tax Appeals committed error.

IV

The petitioner says that in the record and proceedings before the Board of Tax Appeals, and in the decision and final order entered by the Board, manifest error occurred and intervened to the prejudice of the petitioner and it assigns and avers that the following errors, and each of them occurred in the said record proceedings and decision and final order and that upon these it relies to reverse the said decision and final order so rendered and entered by the Board of Tax Appeals.

Assignments of Error

(1) The Board of Tax Appeals erred in holding that the sum of $20,840.12, accrued by petitioner as the tax levied and demanded by the taxing authorities of the State of Mississippi, under Chapter 162 Laws of 1936, was not deductible from petitioner's gross income as a proper tax accrual demanded by the taxing authorities of the State of Mississippi, and especially provided for by section 23 Revenue Acts of 1936, which provides:

"In computing net incomes there shall be allowed as deductions:

[fol. 57] (c) Taxes Generally—Taxes paid or accrued within the taxable year * * * * *"

(2) The Board of Tax Appeals erred in determining that there was a deficiency in petitioner's income tax for the year 1937 in the sum of $3600.09.

(3) The Board of Tax Appeals erred in determining that there was a deficiency in petitioner's excess profit tax for the year 1937 in the sum of $1169.95.

Wherefore the petitioner petitions that the decision of the Board of Tax Appeals be reviews by the United States Circuit Court of Appeals for the Fifth Circuit; that a transcript be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing and that appropriate action be taken by said Court to the end that the errors complained of may be reviewed and corrected.

T. J. Wills, Attorney for Petitioner.

Duly sworn to by T. J. Wills. Jurat omitted in printing.

[fol. 58] BEFORE UNITED STATES BOARD OF TAX APPEALS

AFFIDAVIT OF SERVICE—Filed January 9, 1942

STATE OF MISSISSIPPI,
Forrest County.

Personally appeared before me the undersigned Notary Public, T. J. Wills, attorney of record for the petitioner, who being first duly sworn, says on oath that he has mailed a copy of the foregoing petition for a review of the decision of the Board of Tax Appeals and a copy of the praecipe filed in the cause of Dixie Pine Products Company vs. Commissioner of Internal Revenue, Docket No. 103015, to J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C., postage prepaid, on this the 18th day of December, A. D. 1941.

T. J. Wills.

Subscribed and sworn to before me on this the 18th day of December, A. D. 1941. Edna B. Komp, Notary Public. (Seal.) My commission expires Oct. 18, 1942.

BEFORE UNITED STATES BOARD OF TAX APPEALS

PRAECIPE FOR RECORD—Filed January 9, 1942

[Title omitted]

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, copies duly certified, as corrected, of the following documents and records in the above-entitled cause in connection with and accompanying the enclosed petition for review by the said Circuit Court of Appeals for the Fifth Circuit, heretofore filed in said cause and [fol. 59] considered by the Board of Tax Appeals on the order of the Commissioner of Internal Revenue making an assessment of deficiency income tax and an excess profit tax:

1. The docket entries of the proceedings before the Board.

2. All pleadings filed and considered by the Board.

(a) Petition including annexed copy of deficiency letter in this cause.

(b) Answer of the Commissioner in this cause.

(c) All the evidence, exhibits and documents introduced as evidence in said cause and heard and considered by the Board of Tax Appeals.

3. Finding of fact, opinion and decision of the Board.

4. Petition for review, assignment of error, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. This praecipe.

T. J. Wills, Attorney for Petitioner.

[fol. 60] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 61] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of February 17, 1943

No. 10270

DIXIE PINE PRODUCTS COMPANY

versus

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, and, after argument by T. J. Wills, Esq., for petitioner, and Miss Maryhelen Wigle, Special Assistant to the Attorney General, for respondent, was submitted to the Court.

[fol. 62] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10270

DIXIE PINE PRODUCTS COMPANY, Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition for Review of Decision of the United States Board of Tax Appeals (District of Mississippi)

March 5, 1943

Before Hutcheson, Holmes and McCord, Circuit Judges

McCORD, Circuit Judge:

The Petition for Review involves deficiencies in income and excess profits taxes of $3,600.09 and $1,169.95 determined against Dixie Pine Products Company for the calendar year 1937. The issue is whether the taxpayer's 1937 tax return may be corrected by disallowing deduction of

[fol. 63] an accrued item for Mississippi gasoline taxes which the taxpayer contested and refused to pay, and which, as the result of successful litigation in the State Courts, it never had to pay.

Dixie Pine Products Company was engaged in Mississippi in the business of extracting turpentine, pine oil, and resin from stumps and other waste wood. A quantity of solvent made from petroleum products was used in the process. In 1936 the taxing authorities of Mississippi, contending that the solvent was usable in the operation of automobiles, assessed a State gasoline tax on the solvent received and used by Dixie in that year. The tax was levied under Sections 5(a) and 8(a) of Chapter 162, Laws of Mississippi, 1936, wherein gasoline is defined.

The taxpayer paid the gasoline tax assessed in 1936, and in the same year filed suit in the State Court against the Motor Vehicle Commissioner of Mississippi, alleging that the nature of the solvent and the use to which it was put did not fall within the ambit of the taxing statute; and asking for temporary and permanent injunctions against future collections of the tax. A demurrer filed by the Motor Vehicle Commissioner was sustained by the lower court. An appeal was taken and on January 25, 1937, the Supreme Court of Mississippi handed down its decision holding that on the pleadings the solvent did not fall "within the definition of gasoline upon which a tax is imposed by Section 8(a) of the act". *Dixie Pine Products Company v. Dyer*, 177 Miss. 873, 172 So. 145. After this decision came down, the taxpayer at all times denied that it owed, and ceased and refused to pay, gasoline tax on the solvent used by it.

On December 8, 1938, the taxpayer and the Attorney General of Mississippi filed an agreed statement of facts in the State Court action, and on December 21, 1938, the Chancery Court of the First Judicial District of Hinds County, Mississippi, entered its final decree perpetually enjoining the Motor Vehicle Commissioner from assessing [fol. 64] gasoline tax on the solvent used by Dixie. The final decree was affirmed by the Supreme Court of Mississippi, *Dyer v. Dixie Pine Products Company*, 186 Miss. 567, 191 So. 429.

Dixie Pine Products Company kept its books and filed its income tax return on the accrual basis for the year in question. By letter dated in December, 1937, the attor-

ney for the taxpayer directed that book entries be made accruing the gasoline tax assessed by the Motor Vehicle Commissioner in 1937. In the course of auditing and closing the 1937 books, the actual accrual entries were made by an auditor sometime between January 1, and March 15, 1938, as of December 31, 1937. The amount of tax thus accrued on the books for 1937 was $20,839.38, and this amount was deducted from income in making the 1937 income tax return. The taxpayer never paid the State gasoline taxes, and by way of compensating entry the amount of $20,839.38 was included in income in Dixie's 1938 income tax return as a recovery in view of the Mississippi Chancery Court's decree of December, 1938.

The petitioner contends that its 1937 accrual and deduction of the tax item of $20,839.38 was proper, and that the Board of Tax Appeals erred in holding that this amount was not deductible from gross income for that year. The decision of the Board is without error. During the whole of the tax year for which the right of deduction is asserted, Dixie Pine Products Company was denying liability for the State gasoline taxes, and was affirmatively litigating the applicability of the taxing statute to the solvent used by it. Indeed, when it stopped paying the taxes assessed against it by the Motor Vehicle Commissioner, it had won the first round of litigation in the Supreme Court of Mississippi.

Returns of taxpayers, whether upon the cash or accrual basis, must clearly reflect the income of the tax year; and the great weight of authority is to the effect that where, [fol. 65] as here, a taxpayer is on the accrual basis, it may not deduct as an expense an item on which it is denying or contesting liability. "A mere contingent claim, especially a contested one, whether of loss or gain, may never be sustained or realized; it is too uncertain to be considered in making up an income tax return". *Commissioner v. Southeastern Express Co.*, 56 F. 2d 600; *Lucas v. American Code Co.*, 280 U. S. 445; *Brown v. Helvering*, 291 U. S. 193; *Pharr & Sons v. Commissioner*, 56 F. 2d 832. Cf. *J. A. Dougherty's Sons v. Commissioner*, 121 F. 2d 700; *Ben Bimberg & Co. v. Helvering*, 126 F. 2d 412.

The compensating entry made in 1938 by the petitioner does not preclude correction of the erroneous return for 1937. The correction, coming well within the limitation

period, may be made so that the true income may be reflected for 1937. The taxpayer will, of course, have a claim for refund of any tax overpayment resulting from inclusion of the compensating entry in income of 1938. *Ben Bimberg & Co. v. Helvering*, 126 F. 2d 412; *Leach v. Commissioner*, 50 F. 2d 371; *Bergan v. Commissioner*, 80 F. 2d 89; *Inland Products Co. v. Blair*, 31 F. 2d 867.

The decision of the Board is Affirmed.

[fol. 66] JUDGMENT

Extract from the Minutes of March 5th, 1943

No. 10270

DIXIE PINE PRODUCTS COMPANY,

versus

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of Dixie Pine Products Company for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decision of the said United States Board of Tax Appeals in this cause be, and the same is hereby, affirmed.

[fol. 67] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 68] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter T. J. Wills, File No. 47,572. U. S. Circuit Court of Appeals, Fifth Circuit, Term No. 84. Dixie Pine Products Company, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed June 5, 1943. Term No. 84 O. T. 1943.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 5 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1071 84

DIXIE PINE PRODUCTS COMPANY, A CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

T. J. WILLIS,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
1. Brief statement of the matters involved	1
A. History of case	1
B. Statement of the case	5
C. Prayer for writ	6
Brief in support of petition	7

Table of Cases Cited.

Central United National Bank, 99 F. (2d) 568	6
Great Northern R. R. Co., 30 B. T. A. 691	7
J. A. Daughtry Sons, Inc., 121 F. (2d) 700	6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1071

DIXIE PINE PRODUCTS COMPANY, A CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Dixie Pine Products Company, a corporation, through its attorney, prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, directing it to send up the record in the above-entitled cause, to be reviewed by this court and such order entered therein as may appear from the record is meet and proper to be entered in said cause.

I.

Summary of the Matters Involved and a Brief Statement of the Facts.

A. HISTORY OF THE CASE.

This case involved the assessment of an additional tax by the Commissioner of Revenue against petitioner for the year 1937.

Petitioner is engaged in the naval stores business, reducing the pine stumps and dead wood left behind the saw mill operations in the yellow pine belt. There were in 1937 five such plants operating in different sections of the State of Mississippi. In an operation of this character a solvent is used to dissolve the rosin from pine chips that have had the turpentine and pine oil removed by steam. Petitioner used between 300,000 and 400,000 gallons annually.

The State of Mississippi in 1932 imposed a gasoline tax of 6¢ per gallon on all gasoline petroleum products meeting a certain test that was used, consumed or sold in the State of Mississippi. This reducing agent, or solvent, used by petitioner was a cut of gasoline having an initial boiling point of 230 degrees fahrenheit and a vanishing point of 290 degrees fahrenheit, whereas gasoline itself had an initial point of 80 degrees fahrenheit and a vanishing point of 432 degrees fahrenheit.

The naval stores plants using this solvent did not pay the gasoline tax imposed by Legislative enactment for the four years from 1932 to 1936 on the theory that the tax did not apply.

In 1936 the Legislature appointed a Roving Committee to make investigations of businesses in the State that had escapted paying gasoline tax. This Roving Committee demanded the tax of the five naval stores plants and finally adjusted it by the different industries paying ¼ of 1% per gallon in lieu of the 6¢ that was levied in the Legislative enactment.

The Legislature in 1936 amended the gasoline revenue law, created a Commissioner of Motor Vehicles, with powers and authority from and after its effective date to levy and collect all gasoline taxes. The effective date of the act was May 1st, 1936.

The Roving Committee, in its many searches and meanderings about the state, did not finally make demand for this tax until July 1936 and an adjustment was made about August 1st. The 1936 Act, however, had become effective and the Commissioner had no power and authority to waive any part of the tax but was required to collect the tax plus a 25% penalty for delinquency.

The five naval stores companies, including petitioner herein, began paying the tax beginning September 1, 1936, leaving the tax that had accrued, with the penalty thereon, from May 1st to September 1st, open for future negotiations and final adjustment.

This petitioner thereupon filed a bill in Chancery in Hinds County, asking for an injunction enjoining the Commissioner from collecting the tax on the ground that the law did not apply to the solvent. The suit was one that might be called a friendly or collusive suit. What is meant by it being a collusive suit is that the petitioner and the Motor Vehicle Commissioner, through their attorneys, got together and drew a bill that set forth all of the facts as they were, which was filed by petitioner, to which the Motor Vehicle Commissioner interposed a demurrer, a final decision of which would determine the liability of the industries to pay the tax.

The bill of complaint was filed. A demurrer was interposed and the Chancellor sustained the demurrer and dismissed the bill. An appeal was prosecuted to the State Supreme Court and was there reversed.

The decision of the Supreme Court was handed down in January of 1937. The Supreme Court held that under the statement of facts set forth in the bill of complaint that the gasoline tax did not apply to the solvent. Of course, the decision being from a decree sustaining a demurrer, the case was remanded for further proceedings in accordance with

the opinion there rendered. Appellant immediately ceased to pay the tax for the reason that the facts set forth in the bill of complaint represented the agreed facts between the Motor Vehicle Commissioner and the tax payer, petitioner here. In May of 1937, however, the Assistant Attorney General for the Motor Vehicle Commissioner, filed an answer in the cause denying every fact set forth in the bill of complaint, upon the allegation of which the Supreme Court of the State had based its decision. The other four industries continued to pay the tax. Petitioner herein, under advice of counsel, declined to pay the tax but being on an accrual basis, accrued it. There was no provision for a refund of the tax, if erroneously paid in, and for that reason the petitioner here was advised not to pay the tax in but to accrue it and hold it until the necessity of paying it should be determined by a final decision of the highest court.

In December 1938 the personnel of the Assistant Attorney General's office having changed, a stipulation was made and filed in the case pending, stipulating the facts, the same as they were in the bill of complaint. This stipulation of facts then made the former opinion of the Supreme Court the law of the case and there was no possible chance for a different holding or a contrary decree being entered.

The Chancellor, in December of 1938, entered a final decree enjoining the collection of the tax holding that it did not apply to the solvent. Petitioner herein, thereupon took into its accounts, as a re-captured profit, the sum of $20,840.12, which had been accrued and held against the tax liability.

The tax payer, petitioner here, had taken credit for the accrued tax in its 1937 return. It recaptured the accrued tax in 1938 and placed it in its tax return and settled its tax with the Commissioner of Internal Revenue accordingly.

B. Statement of the Case.

The Commissioner of Internal Revenue denied the tax payer the right to accrue the tax and take credit for it in 1937, for the reason that it was a contested levy of tax and one that might never become final. The Commissioner assessed a deficiency income tax of $3600.09 and an excess profit tax of $1169.95.

A hearing was had before the Commissioner and the levy of the tax sustained. An appeal was taken to the Board of Tax Appeals. The Board of Tax Appeals affirmed the assessment, however, by a divided court. The opinion is on record page 61.

From the decision of the Board of Tax Appeals an appeal was prosecuted to the Circuit Court of Appeals for the Fifth Circuit and was there affirmed. It is to reverse the decision there rendered that this writ of certiorari from this court is sought. The Circuit Court of Appeals, in affirming the case, said that a mere contingent claim, especially a contested one, may never be sustained or realized; it is too uncertain to be considered in making up an income tax return. The court based its opinion upon the authority of cases cited therein, which is on page 4 of the addenda of the record in this case. The cases cited by the court, as authority for its decision, are cases in which the tax payer sought a reduction in its tax upon a contingent liability arising out of breaches of contract and contractual relations and not a liability imposed by statute. In this case the liability was imposed by law. Four of the tax payers conceded liability and paid the tax. It is true they received a refund of the tax by Legislative appropriation after the final decision in the state court, but upon the facts set forth in the answer thereto there was a positive liability for the tax. The cases relied upon by the Circuit Court of Appeals are not applicable. The opinion rendered in this case is in

conflict with the opinion of the Circuit Court of Appeals of the Sixth Circuit in *Commissioner of Internal Revenue* v. *Central United National Bank*, 99 F. (2d) page 568 and the opinion of the Second Circuit Court of Appeals in J. A. Daugherty Sons, Incorporated, 121 F. (2d) page 700.

Prayer for Writ.

Wherefore petitioner respectfully submits that this petition should be sustained and prays that a writ of certiorari may issue, as is provided by law.

Respectfully submitted,

Dixie Pine Products Company,
a Corporation,
Petitioner,
By T. J. Wills,
Attorney for Petitioner,
Hattiesburg, Mississippi.

T. J. Wills,
Atty. for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1071

DIXIE PINE PRODUCTS COMPANY, A CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION.

The Circuit Court of Appeals is in error in affirming the decision of the Board of Tax Appeals levying the tax and excess profit tax in this case.

The law is well settled that the tax payer had to accrue the tax and take credit for it on its income for the year that the liability arose or it would be shut off from getting credit in a subsequent year.

Great Northern R. R. Co., 30 B. T. A. 691.

The tax liability was imposed by statute and whether or not the petitioner, as a tax payer, would have the tax to pay depended upon the physical character of the solvent, as shown by pleadings and proof in the trial of the case. What those physical properties would be, as is shown by the action in this case, rested largely upon the presentation

made by the tax payer and the Commissioner of Motor Vehicles, charged with the duty of levying and collecting the tax. There was no contingency of law as to whether or not the tax applied. What the contingency raised were the facts as presented in the case and such a contingency was one that is recognized as warranting the accrual of the tax by the tax payer on the accrual basis.

This opinion is in conflict with the cases of Central United National Bank, 99 Federal (2nd) page 568 and J. A. Daugherty Sons, Incorporated, 121 Federal (2nd) page 700.

This court should take jurisdiction and clarify the law since there is a conflict in the decisions of the Circuit Courts of Appeal.

Respectfully submitted,

T. J. Wills,
Attorney for Petitioner.

(6476)

FILE COPY

Office - Supreme Court, U. S.
NOV 23 1943
CHARLES ELMORE CROPLEY
CLERK

No. 84

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1943

Dixie Pine Products Company, Petitioner

vs

Commissioner of Internal Revenue, Respondent

BRIEF FOR THE PETITIONER

T. J. WILLS
Solicitor for Petitioner

SUBJECT INDEX

	Page
Point Raised, Presented	1
History of Case	4
Argument	8
Appendix	10

CASES CITED

American Code Co., Lucas v. 280 U. S. 445 3

Baxter Sate Bank, Chicot County Drainage District v. 308 U. S. 371, 60 Sup. Ct. Rep. page 317 8

Bingaman v. Golden Eagle Western Lines, 297, U. S. 626, 56 Sup. Ct. Rep. 624 9

Brown v. Helvering 291 U. S. 193 3

Chicot County Drainage District v. Baxter State Bank, 208 U. S. 371, 60 Sup. Ct. Rep. page 317 8

Commissioner of Internal Revenue v. Central United National Bank, 99 Fed. (2nd) page 568 2-8-9

Commissioner v. Southeastern Express Co., 56 Fed. (2nd) 600 3

Commissioner, Davies Estate v., 126 Fed. (2nd) 291, 2-8-9

Commissioner. J. A. Dougherty & Sons v. 121 Fed. (2nd) 700 2-8-9

Commissioner, Pharr & Sons v. 56 Fed. (2nd) 832 3

Central United National Bank, Commissioner of Internal Revenue v. 99 Fed. (2nd) page 568 2-8-9

Davies Estate v. Commissioner, 126 Fed. (2nd) 291 2-8-9

J A. Dougherty & Sons v. The Commissioner 121 Fed. (2nd) 294 2-8-9

Dixie Pine Products Co. v. Dyer, 178 Miss. 227, 172 Sou. 145 6

Dyer, Dixie Pine Products Co., v. 178 Miss. 227, 172 Sou. 145 6

Golden Eagle Western Lines, Bingaman, v. 297 U. S. 626, 56 Sup. Ct. Rep. 624 9

Helvering, Brown, v. 291 U. S. 193 3

Lucas v. American Code Co., 280 U. S. 445 3

Pharr & Sons v. Commissioner 56 Fed. (2nd) 832 3

Southeastern Express Co., Commissioner, v. 56 Fed. (2nd) 600 3

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 84

Dixie Pine Products Company, Petitioner

vs

Commissioner of Internal Revenue, Respondent

BRIEF FOR THE PETITIONER

MAY IT PLEASE THE COURT:

The petitioner, taxpayer, asserts that the opinion of of the Circuit Court of Appeals of the Fifth Circuit, and the judgment entered thereon, is erroneous and should be reversed.

Petitioner kept its books on an accrual basis. In the year 1937 it accrued $20,839.38 tax assessed and demanded of it by the State of Mississippi. Credit for the tax so accrued was taken against the gross income upon which the income tax was paid.

The Commissioner, respondent, on April 15, 1940, disallowed this accrued deduction and assessed a deficiency tax of $3600.09 and an excess profit tax of $1169.-95. (record page 7).

A hearing was had before the Commissioner and the assessment of the tax was approved by him. An appeal from his decision was prosecuted before the Board of Tax Appeals. The Board of Tax Appeals affirmed the

assessment. The case was then carried to the Circuit Court of Appeals and there affirmed. (record page 46 et sequa).

It is contended by petitioner that the opinion of the Circuit Court of Appeals in this case is in conflict with the cases of **Commissioner of Internal Revenue v. Central United States National Bank, 99 Fed. (2nd) page 568** from the sixth circuit, **J. A. Dougherty & Sons v. The Commissioner, 121 Fed. (2nd) 700** from the third circuit and **Davies Estate v. Commissioner, 126 Fed. (2nd) 294,** from the sixth circuit.

Petitioner accrued the tax and took the deduction under the provisions of section 23 * * (c) of the Revenue Act of 1936. The language of the act is

> "In computing net income there shall be allowed as deductions *** (c) taxes generally—taxes paid or accrued within the taxable year, except—"

Section 23 (a) provides for deductions for the necessary expense incurred in the carrying on of the business, the language of the statute being:

> "In computing net income there shall be allowed as deductions:
>
> (a) Expenses.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which

he has no equity."

The Circuit Court of Appeals of the Fifth circuit, in affirming the assessment of the tax, said:

> "The petitioner contends that its 1937 accrual and deduction of the tax item $20,839.38 was proper, and that the Board of Tax Appeals erred in holding that this amount was not deductible from the gross income of that year. The decision of the Board is without error. During the whole of the tax year for which the right of deduction is asserted, Dixie Pine Products Company was denying liability for the State gasoline tax and was affirmatively litigating the applicability of the taxing statute to the solvent used by it. Indeed when it stopped paying the taxes assessed against it by the Motor Vehicle Commissioner, it had won the first round of litigation in the Supreme Court of Mississippi."

The court then cited in support of its holding the cases

Commissioner v. Southeastern Express Co., 56 Fed. 2nd 600;

Lucas v. American Code Co., 280 U. S. 445;

Brown v. Helvering, 291 U. S. 193;

Pharr & Sons v. Commissioner, 56 Fed. 2nd 832.

Petitioner asserts that these cases correctly interpret deductions allowed under the provisions of section 23 (a) of the Revenue Act in question.

The liability of the taxpayers, in the cases above cited and relied on by the Circuit Court of Appeals, were accruals and deductions against liability growing out of private transactions and subject to private settlements. The cases have no reference whatsoever to a liability imposed by statute or the accrual of a tax.

HISTORY OF THE CASE

Petitioner is engaged in the naval stores business. It extracts rosin from the pine stumps and deadwood left behind the saw mill operations in the yellow pine belt. There were in 1937 five such plants operating in different sections of the State of Mississippi. In an operation of this character a solvent is used to dissolve the rosin from the pine chips that have had the turpentine and pine oil removed by steam. Petitioner used between 300,000 and 400,00 gallons of the solvent annually.

The State of Mississippi in 1932 imposed a gasoline tax of 6c per gallon on all gasoline and petroleum products meeting a certain test that was used, consumed or sold in the State of Mississippi. This reducing agent, or solvent, used by the petitioner was a cut of gasoline having an initial boiling point of 230 degrees fahrenheit and a vanishing point of 290 degrees fahrenheit, whereas gasoline itself had an initial boiling point of 80 degrees fahrenheit and a vanishing point of 432 degrees fahrenheit.

The naval stores plants using this solvent did not pay the gasolne tax imposed by Legislature enactment for the four years from 1932 to 1936.

In 1936 the Legislature appointed a Roving Committee to make investigations of businesses in the State that had escaped paying gasoline tax. This Roving Committee demanded the tax of five naval stores plants and finally adjusted it with them for 1-4 of 1% per gallon in lieu of the 6c levied by the statute.

The Legislature in 1936 amended the gasoline revenue law. It created the office of Commissioner of Motor Vehicles, with powers and authority to levy and collect all gasoline taxes. The effective date of the act was May 1st, 1936.

The Roving Committee, in its many searches and meanderings about the state, did not make demand for this tax until July, 1936. An adjustment was made about August 1st. The 1936 Act, however, had become effective as of May 1st and the Commissioner had no authority to waive any part of the tax. He was required to collect the tax plus a 25% penalty for delinquency.

The five naval stores companies, including petitioner herein, began paying the tax on September 1, 1936. They left the tax that had accrued, with the penalty thereon, from May 1st to September 1st, open for future negotiations and final adjustment.

This petitioner thereupon filed a bill in the Chancery Court of Hinds County, asking for an injunction restraining the Commissioner from collecting the tax. The suit was one that might be called a friendly or collusive. What is meant by it being a collusive suit is that the petitioner and the Motor Vehicle Commissioner, through their attorneys, drew a bill setting forth all of the facts as contended for by both parties. The Motor Vehicle Commissioner agreed to interpose a demurrer thereto. A decision on the demurrer would determine the liability of the complainant for the tax.

The bill of complaint was filed. A demurrer was interposed and the Chancellor sustained the demurrer and dismissed the bill. An appeal was prosecuted to the State Supreme Court and was there reversed.

The decision of the Supreme Court was handed down on January 25th, 1937. The Supreme Court held that under the statement of facts set forth in the bill of complaint that the gasoline tax did not apply to the solvent. Of course, the decision being from a decree sustaining a demurrer, the case was remanded for further proceedings in accordance with the opinion rendered. Appellant immediately ceased to pay the tax for the rea-

son that the facts set forth in the bill of complaint represented the facts as agreed on by the Motor Vehicle Commissioner and the taxpayer, petitioner here.

In presenting the case to the Supreme Court it was urged that to hold that the tax applied would strike down the statute.

The bill of complaint filed in the Chancery Court, asking for the injunction, stated all of the facts, enumerating the properties of the solvent. These facts brought the solvent clearly within the definition of the statute levying the tax. In seeking, however, a favorable decision, the petition alleged that the solvent was not gasoline within the definition of gasoline. Section 5 (a) Chapter 162 Acts of 1936. It alleged that it was not used or usable in propelling motor vehicles when used alone, and was not a liquid that is ordinarily or practically commercially usable in internal combustion engines for the generation of power. It reiterated, however, that the solvent is a petroleum product and has a gravity test above 46 degrees T.B. scale at a temperature of 60 degrees fahrenheit, and that it could be mixed or blended with other petroleum products so as to make it usable as a motor vehicle fuel.

The petition filed, charged that the solvent was not gasoline and then admitted that it contained all the properties and characteristics necessary to meet the requirements of the definition of gasoline in the act. This was done for the purpose of obtaining a judicial interpretation of the act that would square it with the constitution of the United States and of the State. Such an interpretation would change the definition of gasoline by judicial Legislation by giving it that meaning that would not strike the act down.

The opinion in the case held that the bill of complaint was good as against a demurrer. **Dixie Pine Products Company v. Dyer, 178 Miss. 227, 172 Sou. 145.**

This decision of the Court, under the agreement had with the Attorney General, that the bill of complaint stated all the facts would settle the law of the case. The taxpayer then ceased paying the state tax.

In May of 1937, however, the Motor Vehicle Commissioner, filed an answer in the cause denying every fact set forth in the bill of complaint, upon which the Supreme Court had based its decision. The other four industries continued to pay the tax. Petitioner herein, under advice of counsel, declined to pay the tax but being on an accrual basis, accrued it. There was no provision for a refund of the tax, if erroneously paid in, and for that reason the petitioner here was advised not to pay the tax in but to accrue it and await the final outcome of the case.

If the facts, as stated by the Motor Vehicle Commissioner, in his answer were to be established, then the tax would apply unless the contention of the taxpayer, that to so interpret the statute would strike it down, as being in conflict with the constitution should prevail.

The taxpayer had not paid the tax from the first of the year 1937 up until June 1, 1939, and all the penalties provided by statute for non payment of the tax had accrued before the answer was filed. The taxpayer accrued the tax but did not pay it. The reason for not paying it was that there was no provision for a refund of a tax erroneously paid.

In December 1938 a stipulation was made and filed in the case pending, stipulating the facts, the same as they were in the bill of complaint. This stipulation of facts then made the former opinion of the Supreme Court the law of the case and there was no possible chance for a different holding or a contrary decree being entered.

The Chancellor, in December of 1938, entered a final decree enjoining the collection of the tax holding that it

did not apply to the solvent. Petitioner herein, thereupon took into its accounts, as a re-captured profit, the sum of $20,839.83, which had been accrued and held against the tax liability.

ARGUMENT

The true rule of law, with reference to the accruals and credits of a tax assessed, was stated in the case o **Central United National Bank. 99 Fed. (2nd) page 568.** The court in effect said that since the tax had been assessed and it would require a court decision to relieve the taxpayer of the payment, that it is proper to accrue the tax and to deduct it from the gross income for the year in which it is accrued.

In the case of **Dougherty & Sons v. Commissioner of Internal Revenue, 121 Fed. (2nd) page 700,** the court held that where a taxpayer's books are kept on an accrual basis that the taxpayer is entitled to deduct from the gross income tax set up on its books, within the taxable year, the tax so accrued under the statute, even though subsequently it is held unconstitutional and the tax is never paid.

In the case of **Davies Estate v. Commissioner, 126 Fed. (2nd) 294,** the court cited with approval the Dougherty case, holding that the taxpayer had a right to accrue and deduct a tax so assessed against it in the year of the accrual. The court cited the case of **Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 60 Sup. Ct. Rep. page 317,** where the court said:

> "The actual existence of a statute prior to determination of its unconstitutionality is an operative fact and may have consequences which cannot be justly ignored."

The statute of the State of Mississippi was plain and unambiguous. The solvent came within the terms of the

definition of gasoline. To so apply the statute, however, would strike it down or render it so impotent, under the authority of **Bingaman v. Golden Eagle Western Lines 297, U. S. 626, 56 Sup. Ct. Rept. 624,** that it would destroy the entire highway scheme of the state. What the court would do with the case on the bill of complaint and answer of the Commissioner, and proof thereunder, was less predictable than would be the holding of the unconstitutionality of a statute. The accrual of the tax was proper. The taking of the deduction from the gross income for the year in which the tax was accrued was proper.

The decision of the Circuit Court of the Fifth Circuit, in this case, brought it in conflict with the cases of **Central United National Bank, 99 Fed. (2nd) 568. Dougherty & Sons v. Commissioner, 121 Fed. (2nd) 700 and Davies Estate v. Commissioner, 126 Fed. (2nd) 294.**

The cases relied on by the Circuit Court of Appeals were not in point in that they were interpreting section 23 (a) of the Revenue Act whereas this case as the Bank case, the Dougherty case and the Davies case is controlled by section (c) of the Revenue Act.

The decision of the Fifth Circuit Court, being in conflict, should be reversed.

Respectfully submitted,

T. J. WILLS

Solicitor for Petitioner

APPENDIX

Chapter 162 Laws of 1936

DEFINITIONS.

Sec. 5 (a) The word "gasoline" as used in this act shall include all liquid fuels which are used or usable in propelling motor vehicles, either when used alone or when mixed, blended, or compounded, including liquids ordinarily, practically and commercially, usable in internal combustion engines for the generation of power, and all distillates of, and condensates from petroleum, natural gas, coal, coal tar, vegetable ferments, and other products so usable and received in this state, having a gravity test above 46 degrees tagliaubes baume scale, at temperature of 60 degrees F.

EXCISE TAX ON GASOLINE AND OIL.

Sec. 8. Any person engaged in business as a distributor, as defined in this act, shall pay for the privilege of engaging in such business an excise tax equal to and computed as follows:

(a) Six cents (6c) per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state or received in this state for sale, use on the highways, storage, distribution, use in internal combustion engines, or for any commercial purposes.

PURPOSE OF ACT.
Sec. 35.

For the purpose of this act it will be prima facie presumed that all gasoline and oil, or either, as defined herein, imported, received, purchased, acquired, used, stored,

manufactured, refined, distilled, blended, compounded, sold or distributed in this state is intended for use in propelling motor vehicles on the public roads and highways, and the tax liability in this act is based on such presumption. It is the further purpose of this act to provide for the refunding to the consumer of all tax actually paid, less one cent (1c) per gallon, on gasoline not used in propelling motor vehicles on the public highways and roads. All gasoline and oil, or either, entering the State of Mississippi shall be used in computing the tax, except gasoline and oil, or either, brought into the state in the reservoir provided by the manufacturer as the container for motor fuel used in propelling said motor vehicle, not to exceed twenty (20) gallons.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	6
Appendix	7

CITATIONS

Cases:	
Brown v. *Helvering*, 291 U. S. 193	5
Commissioner v. *Southeastern Express Co.*, 56 F. 2d 600	5
Davies' Estate v. *Commissioner*, 126 F. 2d 294, certiorari denied, 317 U. S. 640	5
Dixie Pine Products Co. v. *Dyer*, 178 Miss. 227	3
Dougherty's, J. A., Sons v. *Commissioner*, 121 F. 2d 700	5
Dyer v. *Dixie Pine Products Co.*, 191 So. 429	4
Kentucky & Indiana T. R. Co. v. *Commissioner*, 54 F. 2d 738	5
Liebes, H., & Co. v. *Commissioner*, 90 F. 2d 932	5
Lucas v. *American Code Co.*, 280 U. S. 445	5
Pharr & Sons v. *Commissioner*, 56 F. 2d 832	5
United States v. *Anderson*, 269 U. S. 422	5
Statutes:	
General Laws of Mississippi (1936), c. 162:	
Sec. 5	2
Sec. 8	2
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 23	7
Sec. 41	7
Sec. 42	7
Sec. 43	8
Sec. 48	8

537402—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 84

DIXIE PINE PRODUCTS COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 51) is reported at 45 B. T. A. 286. The opinion of the Circuit Court of Appeals (R. 61–64) is reported at 134 F. 2d 273.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 5, 1943 (R. 64). The petition for writ of certiorari was filed June 5, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a taxpayer on the accrual basis may deduct as an accrued tax under Section 23 (c) of the Revenue Act of 1936 an amount assessed against it for state gasoline tax for which it was currently denying any liability.

STATUTE INVOLVED

The pertinent statute will be found in the Appendix, *infra*.

STATEMENT

The taxpayer, a corporation, was engaged in the business of extracting turpentine, pine oil, and resin from stumps and other waste wood (R. 47). It kept its books and filed its income tax returns on the accrual basis of accounting (R. 50).

The Mississippi state gasoline tax statute defined "gasoline" to "include all liquid fuels which are used or usable in propelling motor vehicles * * * including liquids ordinarily, practically and commercially usable in internal combustion engines for the generation of power, and all distillates of, and condensates from petroleum, natural gas, coal, coal tar, vegetable ferments, and other products so usable and received in this state," meeting specified tests. General Laws of Mississippi (1936), c. 162, Sections 5 (a) and 8 (a). A quantity of solvent made from petroleum products was used by the taxpayer in its extraction process. In 1936, the Assistant Motor Ve-

hicle Commissioner of Mississippi, contending that this solvent was usable in the operation of motor vehicles, assessed the tax on the solvent received and used by the taxpayer in that year. (R. 47–48.) The taxpayer paid the tax, as did other companies engaged in a similar business (R. 48).

On August 6, 1936, however, the taxpayer filed a bill of complaint in the State Chancery Court, alleging that the nature of the solvent and the use to which it was put did not fall within the taxing statute, and asking for temporary and permanent injunctions against the future collection of the tax. A demurrer to the bill was sustained on August 15, 1936. (R. 48.) The taxpayer thereupon appealed to the Supreme Court of Mississippi, and on January 25, 1937, that court reversed the decree of the lower court in sustaining the demurrer and remanded the cause. *Dixie Pine Products Co.* v. *Dyer,* 178 Miss. 227, 172 So. 145.

The taxpayer, after the date of this decision, denied that it owed, and ceased to pay, gasoline tax on the solvent used by it. The Motor Vehicle Commissioner continued to assess and demand payment of the tax throughout 1937. He advised the taxpayer then that he was uncertain whether the tax was due for the use of the solvent and that the determination of liability was then dependent upon the final decision of the court. Other concerns using solvent in a similar process, with one

exception, paid the gasoline tax assessed in 1937. (R. 49.)

On May 15, 1937, the Motor Vehicle Commissioner filed an answer to the taxpayer's bill of complaint. The taxpayer's attorneys, by letter dated in December 1937, directed that entries be made in its books accruing the gasoline tax. The entries were made, as of December 31, 1937, at some time between January 1, and March 15, 1938, in the course of closing and auditing the 1937 books. The amount of the tax thus accrued for 1937 was $20,839.38, and this amount was deducted by taxpayer on its income tax return for 1937. On December 21, 1938, the Mississippi Chancery Court, upon an agreed statement of facts, rendered its final decree perpetually enjoining the Motor Vehicle Commissioner from assessing gasoline tax on the solvent used by taxpayer. The State Supreme Court affirmed on October 23, 1939. *Dyer* v. *Dixie Pine Products Co.*, 191 So. 429. Taxpayer never paid the taxes. The amount of $20,839.38 was reported as income in taxpayer's 1938 tax return. (R. 49–50.)

The Commissioner determined that the 1937 taxes were not deductible from income. The Board of Tax Appeals sustained the determination (R. 51), and its decision was in turn affirmed by the court below (R. 61–64).

ARGUMENT

The court below correctly held that the taxpayer was not entitled to deduct in 1937 the Mississippi gasoline taxes which it was then vigorously contesting and which it in fact never paid. The decision is in accord with the general rule relating to the accrual system of accounting that a taxpayer may not accrue a contested or other contingent liability. *Lucas* v. *American Code Co.*, 280 U. S. 445, 451; *Pharr & Sons* v. *Commissioners*, 56 F. 2d 832 (C. C. A. 5th); *Commissioner* v. *Southeastern Express Co.*, 56 F. 2d 600 (C. C. A. 5th); *Kentucky & Indiana T. R. Co.* v. *Commissioner*, 54 F. 2d 738 (C. C. A. 6th); *H. Liebes & Co.* v. *Commissioner*, 90 F. 2d 932 (C. C. A. 9th); cf. *Brown* v. *Helvering*, 291 U. S. 193; *United States* v. *Anderson*, 269 U. S. 422, 441.

There are several cases, however, which appear to be broadly inconsistent with the general rule, principally *J. A. Dougherty's Sons* v. *Commissioner*, 121 F. 2d 700 (C. C. A. 3d), and *Davies, Estate* v. *Commissioner*, 126 F. 2d 294 (C. C. A. 6th). The Government sought further review in the *Davies* case but this Court denied certiorari. 317 U. S. 640. There would seem to be less occasion for certiorari here, where the Circuit Court of Appeals adhered to established principles, than in the *Davies* case where the result was contrary to those principles.

CONCLUSION

The decision below is correct. The petition should be denied.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
SAMUEL H. LEVY,
MARYHELEN WIGLE,
Special Assistants to the Attorney General.

JULY 1943.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(c) *Taxes Generally.*—Taxes paid or accrued within the taxable year, * * * [with exceptions not material here]

* * * * *

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the dividends paid credit provided in section 27) provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

SEC. 48. DEFINITIONS.

When used in this title—

* * * * * *

(c) *Paid, Incurred, Accrued.*—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

* * * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1943

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Summary of argument	5
Argument:	
I. The state gasoline assessment was not an allowable deduction in 1937 because it was not a properly accrued liability of the tax year	6
II. In any event, petitioner's return may be corrected to reflect the actual nonexistence of liability for the state tax	14
Conclusion	19
Appendix	20

CITATIONS

Cases:	
Acme Coal Co. v. *United States*, 44 F. 2d 95	17
Bergan v. *Commissioner*, 80 F. 2d 89	17
Bimberg, Ben, & Co. v. *Helvering*, 126 F. 2d 412, certiorari denied, 317 U. S. 641	10, 17
Bohemian Breweries v. *United States*, 27 F. Supp. 588	16
Brown v. *Helvering*, 291 U. S. 193	8, 10
Burnet v. *Huff*, 288 U. S. 156	8
Burnet v. *Sanford & Brooks Co.*, 282 U. S. 359	18
Casey v. *Sterling Cider Co.*, 294 Fed. 426	15
Central Power Co. v. *United States*, 44 F. Supp. 596	9
Chicot County Dist. v. *Bank*, 308 U. S. 371	12
Commissioner v. *Brooklyn R. S. Corp.*, 79 F. 2d 833	8
Commissioner v. *Central United Nat. Bank*, 99 F. 2d 568	10
Commissioner v. *Southeastern Express Co.*, 56 F. 2d 600	8
Davies' Estate v. *Commissioner*, 126 F. 2d 294, certiorari denied, 317 U. S. 640	10, 12
Dixie Pine Products Co. v. *Dyer*, 178 Miss. 227	3
Dougherty's, J. A., Sons v. *Commissioner*, 121 F. 2d 700	10, 11, 12
Elliott, E. B., Co. v. *Commissioner*, 45 B. T. A. 82	18
Helvering v. *Cannon Valley Milling Co.*, 129 F. 2d 642	10
Helvering v. *Price*, 309 U. S. 409	7
Inland Products Co. v. *Blair*, 31 F. 2d 867	6, 14, 15, 16
Kentucky & Indiana T. R. Co. v. *Commissioner*, 54 F. 2d 738	9

Cases—Continued.

	Page
Leach v. *Commissioner*, 30 F. 2d 371	17
Lewellyn v. *Elec. Reduction Co.*, 275 U. S. 243	9
Liebes, H., & Co. v. *Commissioner*, 90 F. 2d 932	8
London-Butte Gold M. Co. v. *Commissioner*, 116 F. 2d 478	8
Lucas v. *American Code Co.*, 280 U. S. 445	6, 8, 9, 10
Lucas v. *Ox Fibre Brush Co.*, 281 U. S. 115	8
Monroe Cider Vinegar & Fruit Co. v. *Riordon*, 280 Fed. 624	15
North American Oil v. *Burnet*, 286 U. S. 417	8
Spring City Co. v. *Commissioner*, 292 U. S. 182	8
Triplex Safety Glass Co. of North America v. *Latchum*, 131 F. 2d 1023	8
Umsted v. *Commissioner*, 72 F. 2d 328	8
United States v. *American Can Co.*, 280 U. S. 412	7
United States v. *Anderson*, 269 U. S. 422	5, 7, 8
United States v. *Butler*, 297 U. S. 1	13
United States v. *Safety Car Heating Co.*, 297 U. S. 88	6, 8
Uncasville Mfg. Co. v. *Commissioner*, 55 F. 2d 893, certiorari denied, 286 U. S. 545	17
Statutes:	
General Laws of Mississippi (1936), c. 162:	
Section 5	2
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Section 23	2, 6, 20
Section 41	20
Section 42	20
Section 43	21
Section 48	7, 21
Section 272	21
Section 275	17, 21
Miscellaneous:	
I. T. 1984, III-1 Cum. Bull. 140	18
I. T. 2500, VIII-2 Cum. Bull. 103	18
I. T. 2934, XIV-2 Cum. Bull. 63	18

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 84

DIXIE PINE PRODUCTS COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 38–39) is reported at 45 B. T. A. 286. The opinion of the Circuit Court of Appeals (R. 46–49) is reported at 134 F. 2d 273.

JURISDICTION

The decision of the Circuit Court of Appeals affirming that of the Board of Tax Appeals was entered March 5, 1943 (R. 49). A petition for a writ of certiorari was filed June 5, 1943, and granted on October 11, 1943 (R. 50). Jurisdiction of this Court is invoked under Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in determining the petitioner-taxpayer's income and excess profits tax liability for 1937, the Commissioner correctly disallowed a deduction claimed under Section 23 (c) of the Revenue Act of 1936 for the amount of a state gasoline tax assessed for 1937, where the petitioner on the accrual basis was currently litigating applicability of the state taxing statute and never paid the assessment, the taxing statute being judicially determined inapplicable to petitioner in 1939.

STATUTE INVOLVED

The statute involved will be found in the Appendix, *infra*, pp. 20–22.

STATEMENT

The petitioner corporation was engaged in the business of extracting turpentine, pine oil, and resin from stumps and other waste wood (R. 36). It kept its books and filed its income tax returns under the accrual system of accounting (R. 38).

The Mississippi state gasoline tax statute (General Laws of Mississippi (1936), c. 162, Section 5 (a)) defined "gasoline" to include liquid fuels (R. 36)—

> which are used or usable in propelling motor vehicles * * * including liquids

> ordinarily, practically and commercially usable in internal combustion engines for the generation of power, and all distillates of, and condensates from petroleum * * *.

A quantity of solvent derived from petroleum products was used by the petitioner in its extraction process. In 1936 the Assistant Motor Vehicle Commissioner of Mississippi, contending that this solvent was "usable" in the operation of motor vehicles, assessed the tax on the solvent received and used by the petitioner in that year. The petitioner paid the tax, as did other companies engaged in a similar business. (R. 36.)

On August 6, 1936, however, the petitioner filed a bill of complaint in the state Chancery Court, alleging that the nature of the solvent and the use to which it was put did not fall within the state taxing statute, and asking for temporary and permanent injunctions against the future collection of the tax. A demurrer to the bill was sustained. (R. 36–37.) The petitioner thereupon appealed to the Supreme Court of Mississippi, and on January 25, 1937, that court reversed the decree of the lower court in sustaining the demurrer and remanded the cause. *Dixie Pine Products Co.* v. *Dyer*, 178 Miss. 227. (R. 37.)

The petitioner, after the date of this decision, denied that it owed, and ceased to pay, gasoline tax on the solvent used by it. The Motor Vehicle Commissioner continued to assess and demand

payment of the tax throughout 1937. He advised the petitioner then that he was uncertain whether the tax was due for the use of the solvent and that the determination of liability was then dependent upon the final decisions of the court. Other concerns using solvent in a similar process, with one exception, paid the gasoline tax assessed in 1937. (R. 37.) However, the record does not disclose whether there were many such concerns in Mississippi, nor the amounts paid by them.

On May 15, 1937, the Motor Vehicle Commissioner filed an answer to the taxpayer's bill of complaint. On December 21, 1938, the Mississippi Chancery Court, upon an agreed statement of facts, rendered its final decree perpetually enjoining the Motor Vehicle Commissioner from assessing gasoline tax on the solvent used by taxpayer. (R. 38.) That decree was affirmed by the Supreme Court of Mississippi on October 23, 1939. *Dyer* v. *Dixie Pine Products Co.*, 186 Miss. 567.

The petitioner's attorneys, by letter dated in December 1937, directed that entries be made in its books accruing the 1937 gasoline taxes, which it was then contesting and which it never paid. The entries were made, as of December 31, 1937, at some time between January 1 and March 15, 1938, in the course of closing and auditing the 1937 books. The amount of the tax thus "accrued" for 1937 was $20,839.38 and this amount

was deducted by petitioner on its income-tax return for 1937. The amount of $20,839.38 was reported as income in petitioner's 1938 tax return. (R. 38.)

The Commissioner determined that the 1937 state gasoline taxes were not deductible from income of that year. The Board of Tax Appeals sustained the determination (R. 39) and its decision was in turn affirmed by the court below (R. 46–49).

SUMMARY OF ARGUMENT

1. Petitioner seeks to deduct in 1937 the Mississippi gasoline taxes which it was then vigorously contesting, which it never paid, and which were ultimately held by the Supreme Court of Mississippi to be inapplicable to petitioner. Were petitioner on the cash basis of accounting, it is undisputed that it could not deduct such taxes from its gross income. It claims the deduction only because, being on the accrual basis, it contends that the gasoline taxes "accrued" in 1937. But the terms "accrual" and "accrued" have acquired a meaning of art in tax law, and it has become firmly established that a tax may be accrued for income tax purposes only when "all the events" have occurred "which fix the amount of the tax and determine the liability of the taxpayer to pay it." *United States* v. *Anderson*, 269 U. S. 422, 441. This principle has been applied in a wide variety of cases, both in this Court and

the lower courts. Since the Mississippi tax herein was being vigorously challenged by petitioner in 1937, it is plain that "all the events" had not occurred during 1937, for the dominant event was the outcome of petitioner's litigation with the State, which did not happen until after 1937. See *Lucas* v. *American Code Co.*, 280 U. S. 445; *United States* v. *Safety Car Heating Co.*, 297 U. S. 88, 93–94.

2. In the alternative, wholly apart from principles of accrual accounting, the Government's position here may be sustained by reliance upon such cases as *Inland Products Co.* v. *Blair*, 31 F. 2d 867 (C. C. A. 4), which are discussed in Point II, *infra*, and which indicate that in certain circumstances the Commissioner of Internal Revenue is justified in requiring a taxpayer to correct its return for a prior year which has not yet been barred by limitations.

ARGUMENT

I

THE STATE GASOLINE ASSESSMENT WAS NOT AN ALLOWABLE DEDUCTION IN 1937 BECAUSE IT WAS NOT A PROPERLY ACCRUED LIABILITY OF TE TAX LEAR

Section 23 (c) of the Revenue Act of 1936 (Appendix, *infra*), under which this case arises, allows deduction for taxes "paid or accrued" within the taxable year. The tax period here involved is the calendar year 1937. Neither during that year nor at any other time did petitioner

pay any of the Mississippi gasoline taxes which it now claims as deduction. In 1936 it instituted injunction proceedings against future collections, denying all liability on the ground that the state taxing statute was not applicable to the solvent used in its operations. That contention was ultimately upheld by the Supreme Court of Mississippi in 1939.

If petitioner had kept its books on the cash basis of accounting, there is no question that it would not be entitled to deduct the gasoline taxes which it never paid; for it is settled that a taxpayer on the cash basis may take deductions only with respect to expenditures actually made during the tax year. *Helvering* v. *Price*, 309 U. S. 409. A taxpayer on the accrual basis, however, may deduct in advance of actual payment, if the item has become a properly accrued liability within the meaning of the Federal revenue law. Cf. *United States* v. *Anderson*, 269 U. S. 422; *United States* v. *American Can Co.*, 280 U. S. 412. The taxpayer herein maintained its accounts on the accrual system, but we contend, as held by the court below, that the gasoline taxes were not properly accruable for federal income tax purposes in 1937.

Although the revenue law does not define what constitutes an "accrued" liability,[1] there exists a

[1] Section 48 (c) of the Revenue Act of 1936 (Appendix, *infra*) merely states that the term "paid or accrued" shall be construed according to the method of accounting upon the basis of which the taxpayer's net income is computed for federal tax purposes, i. e., upon the cash or the accrual basis.

very considerable body of decisions interpreting the tax-meaning of the word "accrued." In *United States* v. *Anderson, supra,* which involved a deduction for munitions tax, this Court characterized "accrual" of a tax liability as the time when (269 U. S. 422, 441)—

> all the events * * * occur which fix the amount of the tax and determine the liability of the taxpayer to pay it.

It is now almost uniformly accepted doctrine that income and expense items "accrue" to a taxpayer, *only* when there arises in him a fixed and unconditional right to receive or a fixed and unconditional obligation to pay; so long as the right to receive or the obligation to pay is uncertain or contingent, the item has not "accrued". The uncertainty must be resolved; the determining "event" must be awaited. These principles have been acknowledged in cases involving a wide variety of income and expense items.[2] And where

[2] The following are but random examples taken from a vast body of case law: *United States* v. *Safety Car Heating Co.*, 297 U. S. 88; *Spring City Co.* v. *Commissioner*, 292 U. S. 182; *Brown* v. *Helvering*, 291 U. S. 193; *Burnet* v. *Huff*, 288 U. S. 136; *North American Oil* v. *Burnet*, 286 U. S. 417; *Lucas* v. *Ox Fibre Brush Co.*, 281 U. S. 115; *Lucas* v. *American Code Co.*, 280 U. S. 445; *Triplex Safety Glass Co. of North American* v. *Latchum*, 131 F. 2d 1023 (C. C. A. 3d); *London-Butte Gold M. Co.* v. *Commissioner*, 116 F. 2d 478 (C. C. A. 10th); *H. Liebes & Co.* v. *Commissioner*, 90 F. 2d 932 (C. C. A. 9th); *Commissioner* v. *Brooklyn R. S. Corp.*, 79 F. 2d 833 (C. C. A. 2d); *Umsted* v. *Commissioner*, 72 F. 2d 328 (C. C. A. 8th); *Commissioner* v. *Southeastern Ex-*

a taxpayer denies or contests an alleged obligation, liability therefor is not "unconditional" until he ceases to deny it or the issue is authoritatively decided against him. The resolving "event" in such case is the admission or the determination of liability; the item "accrues" at that time and not before. *Lucas* v. *American Code Co.*, 280 U. S. 445. Cf. *Lewellyn* v. *Elec. Reduction Co.*, 275 U. S. 243.

Thus, in *Lucas* v. *American Code Co., supra,* this Court held, *inter alia,* that a taxpayer which had committed a breach of contract in 1919 could not accrue any deduction in 1919 on account of liability for the breach where it "strenuously contested" that liability, and where judgment for that liability was not entered against it until 1922. 280 U. S. 445, 450–451.

If these principles are applied here, it is apparent that the petitioner had no "accrued" liability in 1937 for the Mississippi gasoline tax, even if it had not been thereafter determined that the state statute was inapplicable. The suit which petitioner had instituted and was currently prosecuting to test the applicability of the taxing statute was a denial of the "liability" to pay; until disposition of that cause, there was always the possibility that petitioner might never have to discharge the purported obligation. The uncer-

---

press Co., 56 F. 2d 600 (C. C. A. 5th); *Kentucky & Indiana T. R. Co.* v. *Commissioner*, 54 F. 2d 738 (C. C. A. 6th); *Central Power Co.* v. *United States*, 44 F. Supp. 596 (C. Cls.).

tainty was finally resolved in October of 1939, when the Mississippi Chancery Court's decree of perpetual injunction against assessing the tax on use by petitioner of its solvent was affirmed by the Supreme Court of that state (R. 38). Petitioner's liability for the state gasoline tax was decidedly not a "fixed and unconditional obligation to pay" during the tax year 1937 nor then recognized by it to be such.[3] Accordingly, we submit, the amount of the assessment was not an "accrued" item of expense of that year. *Brown* v. *Helvering*, 291 U. S. 193; *Lucas* v. *American Code Co.*, 280 U. S. 445.

There have been departures from these principles in several cases in the lower courts, which presumably furnished the basis for certiorari in this case. *Davies' Estate* v. *Commissioner*, 126 F. 2d 294 (C. C. A. 6th), certiorari denied, 317 U. S. 640; *J. A. Dougherty's Sons* v. *Commissioner*, 121 F. 2d 700 (C. C. A. 3d). See also *Helvering* v. *Cannon Valley Milling Co.*, 129 F. 2d 642, 644, fn. 1 (C. C. A. 8th); *Commissioner* v. *Central United Nat. Bank*, 99 F. 2d 568 (C. C. A. 6th). But cf. *Ben Bimberg & Co.* v. *Helvering*, 126 F. 2d 412 (C. C. A. 2d), certiorari denied, 317 U. S. 641.

[3] Indeed, during 1937, the Supreme Court of Mississippi had ruled that the demurrer to petitioner's complaint had been improperly sustained, and, as the court below in the instant case observed (R. 48), petitioner had thus "won the first round of litigation in the Supreme Court of Mississippi."

The deduction claims in the *Dougherty* case, *supra*, were founded on a liquor floor tax statute of the State of Pennsylvania which was declared unconstitutional subsequent to the three tax years for which the deductions were sought. During each of those years, the taxpayer filed information returns with the state covering the amount of liquors on hand subject to the state levy and regularly "accrued" on its books the amount of each year's assessments, but never paid any part of the purported tax. The state taxing authorities, after having granted successive extensions of time for payment, ultimately brought suit against the taxpayer to test the validity of the taxing statute. The taxpayer asserted the defense of unconstitutionality. Before the action came on for hearing, however, the statute was declared invalid in another suit to which the taxpayer was not a party.

The Circuit Court of Appeals for the Third Circuit, in ruling that the assessments were allowable deductions in the years claimed, reasoned that prior to the determination of the taxing statute's invalidity, it had (p. 703) "imposed * * * liability" upon the taxpayer, and therefore the amounts assessed thereunder in the years preceding adjudication of invalidity had "accrued" for federal tax purposes. The court said (p. 700) that it had lately been recognized that the consequences of action taken in obedience to

the requirements of a statute which subsequently is declared unconstitutional are to be appraised in the light of the compulsion exerted by the statute prior to its determined invalidity. Principal reliance was placed on this Court's language in *Chicot County Dist.* v. *Bank,* 308 U. S. 371. In that case, this Court had said (p. 374):

> The actual existence of a statute, prior to such a determination [of invalidity], is an operative fact and may have consequences which cannot justly be ignored.

But the *Chicot County* case was not a tax case and it was misapplied by the Third Circuit in the *Dougherty* case. The question is not whether an invalid statute is "an operative fact," but rather whether liability under such a statute which is being contested may be "accrued" under the revenue acts. The fact that liability is being contested, whether under a statute, contract, or otherwise, is the significant consideration that prevents it from being accrued. Indeed, the fact that the statute is later determined to be invalid is irrelevant; for even if the statute were held to be valid, the item could not be accrued for tax purposes while it is still in contest, although it would be proper to accrue it in the year the statute is sustained.[4]

---

[4] *Davies' Estate* v. *Commissioner,* 126 F. 2d 294 (C. C. A. 6th), certiorari denied, 317 U. S. 640, which approved the reasoning of the *Dougherty* case, similarly rested upon untenable grounds. The taxpayer in the *Davies' Estate* case claimed a deduction for 1935 on account of processing taxes,

The rule of nonaccrual of contested liabilities is good accounting principle and sound tax law; there is no reason to depart therefrom merely because the liability in question is asserted on sovereign authority. Certainly the Revenue Act itself affords no basis for such a distinction. It may be that a tax liability "accrues", by reason of the provisional validity or asserted applicability of the foundation statute, to a taxpayer who consistently recognizes liability thereunder. But if he contests liability under the statute, there is no justification for giving him a deduction that is not available to taxpayers on the cash basis. The purpose of permitting taxpayers to deduct amounts not yet paid out, by means of the accrual system of accounting, is to provide a more accurate measure of the taxpayer's real income for the tax year. But the integrity of that system can be maintained only by permitting deductions for liabilities that have become fixed by law. Where such liabilities are in dispute, they should be accruable only when the dispute is resolved, and not before.

---

notwithstanding the fact that he had obtained an injunction against the collection of such taxes which were subsequently held unconstitutional on January 6, 1936, in *United States* v. *Butler*, 297 U. S. 1, and were thus never paid. The decision of the Sixth Circuit, permitting the accrual of such processing taxes in 1935, was contrary to established principles of accrual accounting under the revenue acts, and its unsoundness is underscored by the illogical distinction drawn between the December 1935 processing taxes on which no returns had been filed and the 1935 processing taxes prior to December.

II

IN ANY EVENT, PETITIONER'S RETURN MAY BE CORRECTED TO REFLECT THE ACTUAL NONEXISTENCE OF LIABILITY FOR THE STATE TAX

In Point I we contended that, regardless of the ultimate outcome in 1939 of petitioner's litigation with the state of Mississippi, it could not deduct the gasoline tax in 1937, because that tax liability, like any other contested liability, could not properly be "accrued" in 1937. However, if the Court should not accept that position, we contend here, in the alternative, that the Commissioner was nevertheless right in correcting petitioner's return to reflect the *actual* nonexistence of liability in 1937.

The power of the Commissioner to correct returns in the light of subsequent events which disclose the true state of affairs during the tax year, so long as it is not barred by the statute of limitations, is indicated by a rather substantial body of decisions in the lower courts and administrative practice. Prominent among those decisions is *Inland Products Co.* v. *Blair*, 31 F. 2d 867 (C. C. A. 4th), where the taxpayer voluntarily paid a federal soft drink excise tax in connection with its product, sweet cider, and deducted the tax. In a subsequent tax year it was judicially determined, however, that the Treasury Regulations, which interpreted the taxing statute to impose the levy on cider were void because, as here, the statute did not apply to the taxpayer's

product.[5] The amount paid as tax was accordingly refunded. The court said of the situation (p. 868) that the—

> collector * * * had no right to demand, and the taxpayer was not required to pay, any tax upon cider, and the payments in question were not payments of tax, but payments made by mistake * * *.

Elimination of the deduction was therefore correction of the error, and placed both Government and taxpayer, the court said (p. 868), "exactly where they would have been, if it [the mistake] had not occurred."

As in the case at bar, the taxpayer in the *Inland Products Co.* case sought to retain the benefit of the deduction it had taken and to "compensate" by returning the refund as income of the refund period. The principal distinction between the *Inland Products Co.* case and this one lies in the fact that the taxpayer there voluntarily paid the tax and received a refund, whereas here no payment and refund, voluntary or otherwise, are involved. The petitioner at bar merely made a book entry of the gasoline tax as an "accrued" expense of 1937 while strenuously denying that it owed any tax, and included the accrual as "recovery" in its 1938 return when its attitude to-

[5] The taxpayer in the *Inland Products Co.* case was apparently not a participant in the suits which determined the inapplicability of the taxing statute to sweet cider. See *Casey* v. *Sterling Cider Co.*, 294 Fed. 426 (C. C. A. 1st); *Monroe Cider Vinegar & Fruit Co.* v. *Riordon*, 280 Fed. 624 (C. C. A. 2d).

ward liability was proved correct. But that distinction would seem only to present the instant situation as an even stronger case for correction, since the error here was without any tangible consequence whatever other than its effect upon the federal income taxes here involved.

The result reached in the *Inland Products Co.* case was confirmed by the Court of Claims when the taxpayer subsequently took the same cause there on allegation that the decision by the Fourth Circuit was void for want of jurisdiction in that court. *Bohemian Breweries* v. *United States*, 27 F. Supp. 588. Passing anew upon the merits of the Commissioner's disallowance of the deduction, the Court of Claims said, as had the Fourth Circuit, that the excise tax paid was not legally due and (pp. 591–592) that—

> So long as a case involving the audit and determination of the correct tax liability of a taxpayer is open and under consideration by the Commissioner of Internal Revenue, it is his duty correctly to determine the income of the taxpayer and deductions to which the taxpayer is entitled.

It is when correction of the earlier year return is barred by the statute of limitations, the Court of Claims said (p. 592), that to prevent tax escape, the refund is to be included as "income" of the later year. But (p. 592)—

> Wherever it is possible to do so, the taxing statutes require that the items of income subject to tax and the deductions to which the taxpayer is legally entitled for the

> years under consideration be correctly and legally determined by the Commissioner in his final decision, notwithstanding such decision may be made several years after the returns for the particular years involved were filed.

There is, of course, no problem of limitations in the case at bar.[6]

The Circuit Court of Appeals for the First Circuit in *Leach* v. *Commissioner*, 50 F. 2d 371, likewise held that deletion of the deduction rather than inclusion in subsequent income was the proper procedure where a taxpayer on the cash basis recovered a judgment of refund in a later year for overpayment of an estate tax in an earlier year which was still "open." The same approach has also been taken by the Circuit Court of Appeals for the Second Circuit toward tax treatment of the recovery of illegally collected income taxes from an estate. *Bergan* v. *Commissioner*, 80 F. 2d 89. Cf. *Ben Bimberg & Co.* v. *Helvering*, 126 F. 2d 412 (C. C. A. 2d), certiorari denied, 317 U. S. 641; *Uncasville Mfg. Co.* v. *Commissioner*, 55 F. 2d 893, 895 (C. C. A. 2d), certiorari denied, 286 U. S. 545; *Acme Coal Co.* v. *United States*, 44 F. 2d 95, 100 (C. Cls.). There are also numerous decisions by the Board of Tax Appeals applying this rule, not only to "other

[6] Petitioner's 1937 return in which it claimed this deduction was presumably filed on or before March 15, 1938. The date of the deficiency notice was April 15, 1940 (R. 7), well within the limitation period. See Revenue Act of 1936, Section 275, Appendix, *infra*.

tax" deductions upon which there was never liability in fact but to other classes of factually nonexistent liabilities as well; and no distinction has been made between accruals and payments. See *E. B. Elliott Co.* v. *Commissioner,* 45 B. T. A. 82, for a representative list of such cases. For rulings indicating administrative practice in accord with these principles, see I. T. 1984, III-1 Cum. Bull. 140; I. T. 2500, VIII–2 Cum. Bull. 103; I. T. 2934, XIV–2 Cum. Bull. 63.

The maintenance of the statutory annual system of accounting, as illustrated by *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, is, of course, of great importance to the Government in the administration of the income tax laws, and we do not wish to suggest any rule here that would weaken that principle. But there is no necessary conflict between that principle and the right of the Commissioner to correct the taxpayer's return to reflect the fact that the liability upon which a deduction claim is based was actually nonexistent. Thus, it has never been thought that the principle of the annual system prevents the Commissioner within the period of limitations from correcting "errors" in the taxpayer's return, such as errors of computation or omission. And it is not unreasonable to classify with such errors a mistaken belief in the existence of a liability which is subsequently shown to be nonexistent.[7]

[7] The point may be illustrated by the following example. Suppose that a taxpayer receives a bill for $1,000 for services

CONCLUSION

Since liability for the gasoline taxes was being vigorously contested by petitioner in 1937 it should not be allowed to accrue those taxes as a deduction for that year. In the alternative, apart from the principles of accrual accounting, the same result may be reached by applying the decisions permitting the Commissioner to correct an erroneous return for an earlier year that is still open. Upon either theory, the judgment below should be affirmed. The first theory, however, is based upon principles that have long been firmly established by decisions of this court, and offers a more satisfactory solution.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
ARNOLD RAUM,
ROBERT N. ANDERSON,
MARYHELEN WIGLE,
Special Assistants to the Attorney General.

DECEMBER 1943.

---

rendered to him and that he accepts the bill as correct and accrues the item. After the tax year closes the creditor, discovering that he has erroneously overcharged the taxpayer $200, voluntarily corrects the bill. It would seem clear that so long as the tax year is not barred by limitations, the Commissioner should be able to require the taxpayer to correct its return.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(c) *Taxes generally.*—Taxes paid or accrued within the taxable year, * * * [with exceptions not material here].

* * * * *

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the dividends paid credit provided in section 27) provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

* * * * * *

SEC. 48. DEFINITIONS.

When used in this title—

* * * * * *

(c) *Paid, Incurred, Accrued.*—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

* * * * * *

SEC. 272. PROCEDURE IN GENERAL.

* * * * * *

(g) *Jurisdiction Over Other Taxable Years.*—The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

* * * * * *

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this title shall be

assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPREME COURT OF THE UNITED STATES.

No. 84.—October Term, 1943.

Dixie Pine Products Company, Petitioner, vs. Commissioner of Internal Revenue.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 3, 1944.]

Mr. Justice Roberts delivered the opinion of the Court.

The question presented concerns the propriety of the respondent's disallowance of a deduction from income which petitioner took in its federal income tax return for 1937.

In 1936 the Mississippi taxing authorities declared that a solvent used by petitioner in its business was gasoline within the meaning of a state law defining gasoline and laying a tax upon its receipt and use. Accordingly a tax was assessed against the petitioner with respect to the receipt and use of the solvent in 1936. Petitioner paid the tax, and, in the same year, brought suit against the Motor Vehicle Commissioner of Mississippi alleging that the solvent was not within the comprehension of the state law and that the Commissioner should be temporarily and permanently enjoined from future collections of tax in respect of it. The Commissioner's demurrer to the complaint was sustained but, on appeal, the Supreme Court of Mississippi decided that, on the pleadings, the solvent was not within the definition of gasoline contained in the state statute. After this decision petitioner denied that it owed, and ceased and refused to pay, any gasoline tax on solvent used by it.

In December 1937, on advice of counsel, petitioner (which kept its books and filed its federal income tax returns on the accrual basis) made book entries accruing gasoline tax assessed by the Motor Vehicle Commissioner in 1937. The actual accrual entries were made sometime between January 1 and March 15, 1938, as of December 31, 1937, in the amount of approximately $21,000, and petitioner deducted this amount from income in making its

1937 federal income tax return, although the sum had not been, and never was, paid.

In December 1938 petitioner and the Attorney General of Mississippi filed an agreed statement of facts in the state court suit, and, in the same month, the trial judge entered a final decree perpetually enjoining the Motor Vehicle Commissioner from assessing gasoline tax on the solvent used by petitioner. This decree was subsequently affirmed by the Supreme Court of Mississippi. In its 1938 federal income tax return petitioner, by way of compensating entry, included the sum of $21,000 as income and as a recovery, in view of the Mississippi trial court's decree of December 1938.

The sole question is whether the Commissioner was right in disallowing the deduction for the tax year 1937. The Board of Tax Appeals held that he was,[1] and the court below affirmed its decision.[2] We took the case because of a conceded conflict in principle with decisions in other circuits.[3]

Section 23(c) of the Revenue Act of 1936[4] permits the deduction from gross income of taxes "paid or accrued within the taxable year". Sections 41, 42, and 43 make provision for tax accounting on the accrual basis, where the taxpayer keeps his books on that principle, provided his method clearly reflects his income in any taxable year.

The provisions of the Revenue Act of 1936 worked no significant change over earlier Acts respecting the permissible basis of calculating annual taxable income. The applicable principles of accounting on the accrual basis had been adduced and applied by the Board of Tax Appeals in numerous decisions.[5] It has never been questioned that a taxpayer who accounts on the accrual basis may, and should, deduct from gross income a liability which really accrues in the taxable year.[6] It has long been held

[1] 45 B. T. A. 286.

[2] 134 F. 2d 273.

[3] Commissioner *v.* Central United National Bank, 99 F. 2d 568; J. A. Dougherty's Sons *v.* Commissioner, 121 F. 2d 700; Davies' Estate *v.* Commissioner, 126 F. 2d 294.

[4] 49 Stat. 1648, 1659.

[5] See Lucas *v.* American Code Co., 280 U. S. 445, Notes 1 and 3, pp. 450, 452.

[6] United States *v.* Anderson, 269 U. S. 422; American National Co. *v.* United States, 274 U. S. 99; Niles Bement Pond Co. *v.* United States, 281 U. S. 357; Aluminum Castings Co. *v.* Routzahn, 282 U. S. 92; cf. Continental Tire and Lumber Co. *v.* United States, 286 U. S. 290.

that, in order truly to reflect the income of a given year, all the events must occur in that year which fix the amount and the fact of the taxpayer's liability for items of indebtedness deducted though not paid;[7] and this cannot be the case where the liability is contingent and is contested by the taxpayer.[8] Here the taxpayer was strenuously contesting liability in the courts and, at the same time, deducting the amount of the tax, on the theory that the state's exaction constituted a fixed and certain liability. This it could not do. It must, in the circumstances, await the event of the state court litigation and might claim a deduction only for the taxable year in which its liability for the tax was finally adjudicated.[9]

To this effect are the decisions of the Board of Tax Appeals in numerous cases, and the instant decision was in line with earlier rulings as to proper tax accounting practice. Since the Board applied the correct rule of law, its determination that the item in question was not properly deducted on the accrual basis is entitled to the finality indicated by *Dobson* v. *Helvering*, 320 U. S. —. The court below properly refused to disturb the Board's determination.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[7] United States v. Anderson, *supra*, 441.

[8] Lucas v. American Code Co., *supra*, 450, 451.

[9] Cf. Brown v. Helvering, 291 U. S. 183.